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THE

MINING REPORTS.

CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN, ENGLISH AND CANADIAN REPORTS
CHRONOLOGICALLY ARRANGED

WITH NOTES AND REFERENCES.

BY

R. S. MORRISON AND EMILIO D. DESOTO,
OF THE COLORADO BAR.

VOL. XX.

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MINING REPORTS

VOL. XX.

MONTANA ORE PURCHASING CO. v. BOSTON & MONTANA CONSOLIDATED COPPER AND SILVER MINING CO.

(22 Montana 159; 56 Pac. 120. Supreme Court. February 13, 1899.)

[1]**The discretion of the lower court in granting and dissolving injunctions is not unlimited. The right of appeal, from its exercise, involves the right to review the facts upon which it was exercised and to reverse for abuse of discretion.**

The mere chance of a lode apexing within plaintiff's territory is not sufficient grounds upon which to base a writ enjoining mining upon such lode.

[2]**An injunction against assertion of title by suit is unusual and upon the case made is without authority of law.**

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[1]Discretion defined. *Haywood* v. *Cope*, 6 M. R. 500. The granting of a preliminary injunction in a mining case is largely a matter of discretion. *Anaconda Co.* v. *Butte Co.* 17 Mont. 519; 43 Pac. 924.

[2]The fact of applying for injunction cannot be used as an excuse to deprive defendant of right of trial at law. *U. S. M. Co.* v. *Lawson*, 115 Fed. 1005.

Possible danger of fire from strike in second well, no excuse for enjoining its sinking. *Pope* v. *Bridgewater Co.* 52 W. Va. 252; 43 S. E. 87.

Temporary injunction may issue on less evidence than enough to decide for plaintiff on final trial. *Colusa Co.* v. *Barnard*, 28 Mont. 11; 72 Pac. 45.

Appeal from District Court, Silver Bow County; WILLIAM CLANCY, Judge.

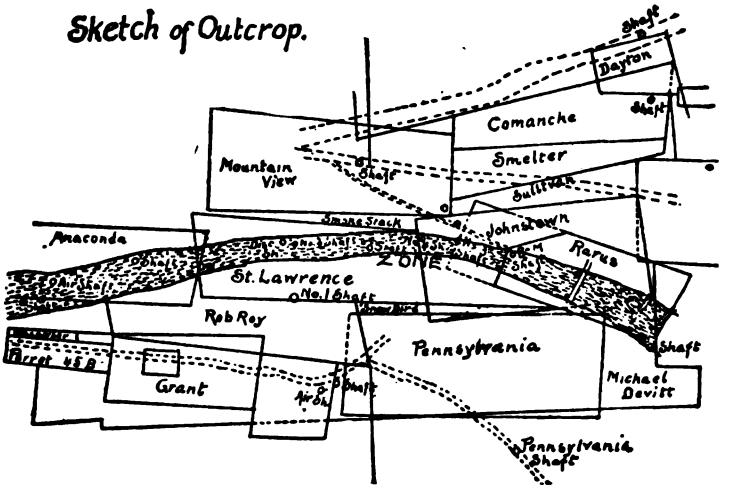
Suit by the Montana Ore-Purchasing Company against the Boston & Montana Consolidated Copper and Silver Mining Company. From an order denying a motion to dissolve a temporary injunction, and modifying the injunction, defendant appeals. Reversed.

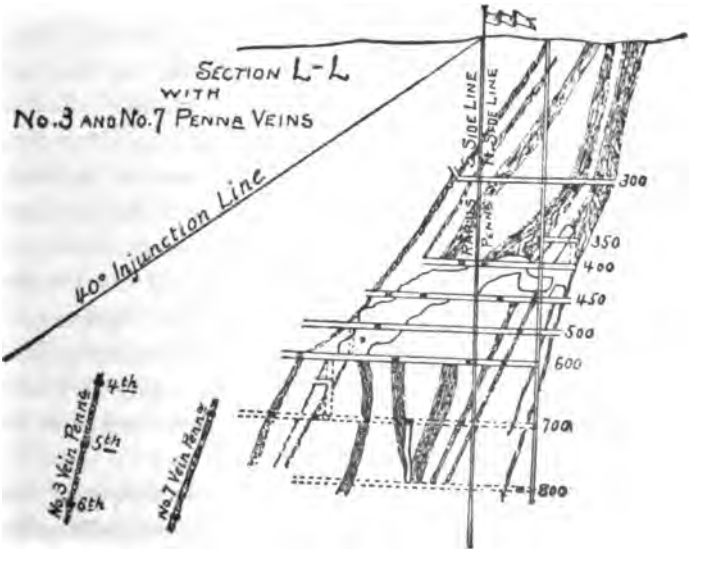
Statement of the case by the Justice delivering the opinion:

Action in damages by plaintiff (respondent) against defendant (appellant) for ores extracted from certain mineral veins, the apexes of which the plaintiff claims to have. Defendant, by answer, put in issue all material averments of the complaint.

Plaintiff claims ownership of the veins by reason of its ownership of certain portions of the Johnstown lode claim, and alleges that the veins upon which defendant was working have their apexes within plaintiff's surface claims. The portions of the Johnstown owned by plaintiff are illustrated by the diagrams published in the case of *Montana Ore Purchasing Co.* v. *Boston & Montana Consolidated Copper and Silver Mining Co.*, 20 Mont. 336, 51 Pac. 159. Reference to these diagrams shows that the ground owned by plaintiff is a strip only of the Johnstown lode claim, running northwest and southeast. The other portions of the Johnstown are owned by defendant. Included in such other portions, and towards the southwesterly end, is a strip lying south of the plaintiff's ground, and north of the Pennsylvania lode claim, all of which is defendant's property. To the east of this piece of the Johnstown, and north of defendant's Pennsylvania claim, lies a strip of mining ground known as the "Snow Bird," the property of the Anaconda Mining Company. When this action was begun, defendant was mining within the limits of

the Pennsylvania lode claim, at a point some 600 feet distant from the surface line of plaintiff's property.





On *ex parte* application of plaintiff, defendant was first

enjoined by temporary order from entering upon or working any veins within a vertical plane drawn downward at the surface, one through the east end line of the Johnstown claim, and the other through the west end line of that portion of the Johnstown owned by plaintiff, which line lay in the direction of S., 25 deg. W., 235 feet, continuing southerly so as to intersect the veins or lodes lying southerly from the Johnstown claim, and having their apexes therein, and which underlie a plane drawn at an angle of 40 deg. from the horizontal from the north line of the Pennsylvania claim.

Upon motion to vacate the injunction order, a hearing was had. The motion was overruled, but the first order was modified by temporary restraining order enjoining defendant from mining upon that certain vein designated by defendant as its vein No. 3, and from extracting ore from all veins within the Pennsylvania lode claim lying north of said vein No. 3, and from the continuations of said veins as claimed by plaintiff to the west. The injuction order recited further, that the modified order applied only to such vein or ore bodies above mentioned within the Pennsylvania lode claim and to the south thereof, and all the portion thereof which lay between a plane passed through the east end line of the Johnstown lode claim, extended to an intersection therewith, and a plane drawn through a west end line of the portion of the Johnstown owned by plaintiff, continued in its own direction until it intersects the west end line of the Pennsylvania lode claim, or that line produced. The diagrams serve to better illustrate the position of the several claims referred to. There was a further modification, by which defendant was not prevented from doing development work, but was required to store all ore extracted.

The injunction order also contained the following command: "It is further ordered that you, the said defendant, your officers, attorneys, agents, servants, and employes, and all persons acting through or under you, be, and you are

hereby, enjoined from commencing or prosecuting any action in law or equity against this plaintiff for or in respect to the several matters alleged in its complaint, or for and in respect to the ownership of the vein, lode, and deposits of ores lying within the above-mentioned boundaries and plaintiff's claim of right thereunder, until the further order and judgment of this court."

Defendant appeals from the order denying the motion to dissolve and modifying the temporary injunction.

FORBIS & EVANS and WM. H. DE WITT, for appellant.

R. B. SMITH, J. J. MCHATTON and CLAYBERG & CORBETT, for respondent.

HUNT, J. Defendant, on the motion to dissolve, after introducing maps showing the relative positions of the veins and claims involved, put in its evidence which consisted principally of the testimony of mining engineers who are in charge of and familiar with the workings of the Pennsylvania and other of defendant's lode claims. From their testimony we collect the following: When this action was brought, defendant was working in No. 3 vein, as shown on the diagram, on the plane of a section 621 feet from the Pennsylvania claim, at the point where No. 3 vein is nearest to the north side of the Pennsylvania claim. Upon the trial of a suit entitled *"Morse* v. *The Montana Ore-Purchasing Company,"* pending in the federal courts, this plaintiff had designated a tract of country, indicated on the map, as a mineralized zone having its apex in the plaintiff's Rarus claim, but such zone lay east of defendant's No. 3 vein, which was not one of the veins of such zone. Plaintiff's witnesses had sworn to this effect in said former suit, and had claimed that the hanging wall of such zone was quite a distance north of defendant's No. 7 vein, as shown on the diagram used. Wit-

nesses said that No. 3 vein would probably have its apex 600 feet south, and No. 7 also many feet south, of any ground owned by plaintiff; that plaintiff had never done any development work to demonstrate where the apex of the vein they claim is; that, on the trial of the above referred to suit in the federal court, plaintiff's witnesses had sworn that in the Pennsylvania shaft, close to the end line where a crosscut had been driven, there was no vein, and defendant's experts said on this hearing, if that were so, it would be impossible for the apexes of the No. 3 and No. 7 veins to come within plaintiff's ground at all. Witnesses also said that a 40 deg. line, as fixed by the court's order, cut right through No. 7 vein, and all that portion of the vein beneath the line could not be worked; that the crosscuts shown upon a section map introduced (marked "L-L") ran right in the hanging wall rock of the zone as claimed by plaintiff, and that the 40 deg. line is steeper than the veins, and would intercept the section in which No. 3 vein would lie.

The cross-examination elicited that, so far as any veins showed which were developed by the plaintiff towards the surface lying east of the west end line of the Johnstown, they had their apexes in the plaintiff's ground; that the strike of No. 3 vein on the 600-foot level underneath the Pennsylvania surface, as compared with the direction of the Johnstown side line, is approximately parallel, and the apex of said No. 3 vein would lie very close to the south side line of the Pennsylvania claim; that in the trial in the federal court defendant's contention was that there was nothing to justify the theory of a zone, but, if there was a zone, it would embrace the whole of Butte City; that some of the stopes made on the ore body had one dip, others another; some of the ore bodies were vertical, others dipped 45 deg. to the south; that there are two veins between what had been termed the east and west faults,—one with a dip of about 65 deg., the other of 40 to 45 deg.; that, in places, the vein or veins had a flatter

dip, and, following a flat vein to the south on the dip, it would not reach No. 3 and No. 7 veins, but go to the west of them; that there are several faults down in the Pennsylvania claim; that in some places the apex of the vein is 1,000 feet below the surface, but that at one point it is cut by the 40 deg. line.

It was also testified to that the apex of the zone claimed by plaintiff is 130 feet on the west end line of the Johnstown, and 300 feet on the plane of the east end line thereof; that it had been claimed by some of plaintiff's engineers in the federal suit that a crosscut that had been run south from the hanging wall was all in country rock; that others had said there was a small vein up near the north end, but that in its course south there was no vein; that neither of the veins Nos. 3 or 7 had an apex in that portion of the Johnstown owned by plaintiff; that the dip of the Pennsylvania No. 1 vein from the 400 level to the 500 is about 45 deg., but further east it is a little flatter, so that the plane established by the injunction order would in depth certainly interfere with the defendant's veins, no matter whether the upper portions stood straighter and were above the plane; that at one point in the neighborhood of the Pennsylvania shaft the dip of one vein is 60 deg.; that between the two main fault planes in that country near the surface there is generally crushed and broken-up matter, but below the 350-foot level are apparently two well-defined veins—the one to the north considerably steeper than the south one, with a dip to the one of about 38 deg., in places flatter; that if No. 3 vein were taken at, say, the 600 level, and a line projected to the surface at 50 deg., it would come out in the Pennsylvania lines; that there is a difference of from 100 to 200 feet to the surface of the ground between the north and south side lines of the Pennsylvania, and, if a 38 deg. dip were taken, veins No. 3 and 7 would be intersected considerably below the points where they are developed; that the apexes of both said veins

are beneath the fault in the west drift; that one fault dips southwest; and that the injunction plane line would presently cut any vein lying at a greater angle than 40 deg. south, including the Pennsylvania vein No. 1, where the vein faults below the 400-foot level, the fault passing through the 400-foot floor west of the Pennsylvania shaft.

On the part of plaintiff, the evidence of its engineers was that it is impossible to tell where the ore bodies included in the Pennsylvania claim do apex; that ore bodies are to be found in the Pennsylvania underlying a plane drawn through the north side line of the Pennsylvania claim, and extended to the south at an angle of 40 deg. These ore bodies lie comparatively flat, particularly on the west side of the east fault, and veins Nos. 3 and 7 may have their apexes in the Johnstown, and in all probability they do. These veins have a much flatter dip on the west than on the east side of the fault, as they seem to change their dip passing through the fault. The east fault intersects the veins. No. 3 has ore on both sides of the fault, and the dip on the west side of the fault is much flatter, dipping 40 to 45 deg. Witnesses further stated that all the veins that have apexes on the Johnstown further north dip underneath the Pennsylvania; that considering the dip of the veins within the side lines of the Johnstown, and the dip of the vein west of the east fault, No. 3 vein would probably reach the Johnstown claim; that No. 7 vein certainly has its apex within the Johnstown side line; that the east fault, if followed to the surface, might cut the lower corner of the Pennsylvania, but the fault would generally be entirely east of the Pennsylvania claim; that no apexes had been discovered which could be connected with No. 3 or No. 7 veins, there having been no development near the surface of any of these veins that shows their apexes at all; but that there is nothing in the Pennsylvania claim which shows with certainty where the apexes of Nos. 3 and 7 are.

On cross-examination it was developed that all of the ore streaks lying above a certain point in one of the faults have about a 40 deg. dip; below that they are straighter. It was also testified to by plaintiff's witnesses that in the No. 3 vein there were places where it was intersected by the east fault; that there was a crevice deemed a clay seam; that all of the ore streaks to the west of the clay seams in the Rarus have a very flat dip, approaching 35 deg. in places; that the strike of No. 3 vein is about parallel to the side line of the Johnstown's side line, so far as the workings on the 600 and 700-foot levels show; that, if No. 3 vein were continued on its present strike and dip, the chances are the cropping would be to the north of the Pennsylvania north side line; that the workings disclosed and lying west of the east clay seam or fault, and made from the Rarus shaft, indicate that the apexes are in that part of the Johnstown owned by plaintiff; that the drift run on the 600 level of the Pennsylvania, supposed to be on the No. 7 vein, is practically in the locality where a drift, to be made following the vein from the Johnstown surface by plaintiff, would reach down to the No. 7 vein at the 600-foot level; that there was a fault in No. 3 vein on the 700 level; that No. 3 "had a very good chance" of having its apex in the Johnstown; and that, if what plaintiff's witnesses called the "fault vein" did not cut the 3 and 7 veins so they could be followed, "you would pass through the clay seam into what you call the vein, and pass into the Johnstown ground."

In reviewing this case, we have not lost sight of the established rule that the granting or denying of a temporary restraining order by a district court or judge, in mining suits particularly, is a matter of judicial discretion, not to be interfered with on appeal, unless it clearly appears that that discretion has been abused. We affirm that general doctrine, but do not interpret it as granting to the district courts an unlimited discretion, the exercise of which is not to be revised

by the supreme court of the state. The right of appeal from an order refusing to vacate a temporary order involves the right to have this tribunal review the facts upon which the lower court assumed to exercise judicial discretion, to the end that we shall decide finally whether or not from the decision made by the district court, considering the nature, circumstances, and facts of the case, there has been an exercise of that judicial discretion alone comprehended in law. There is no hard and fast rule governing discretion; if there were, discretion would have no place; yet no discretion contemplated by the law can be wisely exercised, unless it be guided and controlled by certain legal principles. These principles have as a foundation the surer doing of equity between parties. The exercise of the power of a judge to say injunction shall or shall not issue, without regard to the grounds upon which that power may be exercised, is not judicial discretion. The regulation of the power must always be by the judgment of the court or judge upon the case before him, rather than by his humor to exert the great power he possesses. If the discretion be of the one kind, it is not to be interfered with; but, if it be of the other, it will be reviewed and overturned, as not appearing to have been made on grounds which find legal reason and support.

In this case it appears clearly to us that the court abused its discretion. The evidence discloses that defendant was working within its own ground, and upon veins which have their apexes within its own ground. The plaintiff's own witnesses frankly said there was not sufficient development made by plaintiff at the time of hearing on this motion for them to say that the apexes of the veins are within plaintiff's ground. The mineral zone referred to in the testimony did not apparently warrant the claim by plaintiff to the veins involved herein, inasmuch as plaintiff's experts had admitted on another trial that, although the zone had been examined to a great depth, it did not show these particular veins as part of

it. A mere *"chance"* that the veins might have their apexes within plaintiff's property is really the only foundation for the injunction order restraining defendant from working the veins within the limits of its own ground; but this "chance" is far too shadowy to warrant a continuance of the order, when we consider the fact that plaintiff's engineers had theretofore testified that these veins did not constitute part of the zone which had its apex in plaintiff's ground, and that no changed conditions appeared to exist since their former opinions had been expressed, to warrant their now saying differently.

There is nothing substantial in the evidence of plaintiff from which the district court could judge that plaintiff was probably right, and that injury would follow a denial of the restraining order pending the determination of the suit. Injunction orders should not be kept in force, and parties denied the right of working their own mines, upon the vague possibilities that veins within their claims may have their apexes in another owner's ground; in other words, the writ is not solely for the purpose of preserving the property in *statu quo,* and it will not be granted for that purpose only, unless the party seeking it shows that, if it be not granted, real injury will probably ensue to his rights. *A fortiori,* it should be dissolved where the party enjoined is within the limits of his own possession, and clearly shows that there is no reasonable probability of his trespassing on plaintiff's property. Nothing in *Boyd* v. *Desrozier,* 20 Mont. 444, 52 Pac. 53, or *Heinze* v. *Mining Co.,* 20 Mont. 528, 52 Pac. 273, conflicts with our opinion herein, for the facts in those cases were entirely different. So much for the question of discretion.

As what we have said is decisive of the questions before us, we need not consider the unusual order of the court enjoining defendant from commencing or prosecuting any action at law or in equity against this plaintiff in respect to the several matters alleged in plaintiff's complaint, or for or in

respect to the ownership of the veins lying beneath the plane established by the court's order, until the further order of the court. No showing was made to justify such a clause in the injunction order, and we know of no authority in the court to make it. We advert to this point merely as going to show that, upon the whole case, the district court has violated the plainest rules which confine its power within the bounds of law and sound legal discretion. *Butte & B. Consol. M. Co.* v. *Montana Ore Purchasing Co.* 21 Mont. 539, 55 Pac. 112.

The order denying the motion to dissolve and modifying the temporary restraining order issued is reversed, and the cause is remanded for further proceedings, with directions to dissolve the temporary restraining order heretofore issued.

Reversed and remanded.

BRANTLEY, C. J., and PIGOTT, J., concur.

CLARA KINNEY v. JAMES A. FLEMING ET AL.

(56 Pacific 723. Supreme Court of Arizona. March 15, 1899.)

[1]**Abandonment before record.** Where the active locators of a claim after putting up monuments throw them down and move away without intent to return, the abandonment is complete, notwithstanding the period allowed by law to perfect location has not expired.

After actual abandonment there can be no trespass upon, or invasion of the rights of the prior locators.

Suit before record. Where suit is brought before expiration of the period allowed to file location certificate the plaintiff is only required to prove the discovery and location—the acts required of him prior to his record.

[2]**Tieing to adjoining claim.** The call in the notice for an adjoining mine makes a good tie. It is a reference to a permanent monument. And if the existence of the mine so called for is disputed the objecting party must show its non-existence.

Sufficient location certificate. The location certificate in evidence examined and held a fair compliance with the statute.

Appeal from District Court, Gila County; before Justice FLETCHER M. DOAN.

Action by Clara Kinney against James A. Fleming and another. Judgment for defendants, and plaintiff appeals. Affirmed.

[1]*Woodward* v. *Mitchell*, 18 M. R. 158.

Where some of the co-owners of a possessory claim expressly authorize a stranger to relocate and the remaining owner says he does not care to have anything more to do with it, there is a complete abandonment. *Conn* v. *O'Berto*, — Colo. —; 76 Pac. 369.

The Statute of Frauds does not apply to such mode of transfer. *Id.*

The grantee of an invalid location may afterward make a valid location on the same. *Miller* v. *Chrisman*, 140 Cal. 440; 73 Pac. 1083.

[2]*Riste* v. *Morton*, 20 Mont. 139; 49 Pac. 656. *Book* v. *Justice Co.* 17 M. R. 617.

Blazed trees, squared rock monuments and the prospect hole are permanent objects within the meaning of R. S. § 2324. *Hansen* v. *Fletcher*, 10 Utah 256; 37 Pac. 480.

Trees cut off are good as corners though described as stakes. *Id.*

J. S. SNIFFEN and OWEN T. ROUSE, for appellant.

E. J. EDWARDS, for appellees.

STREET, C. J. 1. The appellant brought an action in the district court of Gila county against appellees to quiet title to a certain mine or mining claim, located on the 12th day of September, 1896, called the "Deep Down Mining Claim." Defendants made answer, and denied the validity of the location of the Deep Down mining claim, but admitted the acts of the location thereof. As a further answer they alleged that they were in possession of the ground covered by the Deep Down mining claim, by virtue of being the owner of a mining claim called the "Skull," located on the 4th day of September, 1896. Said action was not brought as an adverse, pursuant to an application for patent. Neither party, at the time of the commencement of the action or at the trial thereof, had made application for patent to either of these claims.

On the trial of the case plaintiff asserted, and adduced some evidence to prove, that, at the time defendants had located the Skull mining claim, the ground was not open to location, by reason of the same having been located on the 13th day of June, 1896, by A. O. Crane, John Kasser, George Gessell, and W. J. Grandstaff, and known as the "Damfino Mining Claim"; that the ground covered by both the Skull claim and the Deep Down claim was the same as that covered by the Damfino mining claim; and that the ground was not open to location or relocation until the expiration of 90 days from the 13th day of June, 1896, to wit, the 11th of September, 1896. It was asserted by the defendants that the Damfino mining claim, located on the 13th of June, 1896, was not a valid mining claim, and, further, that before the Skull mining claim was located the locators of the Damfino mining claim had abandoned the ground. The cause was

tried to the court without a jury, and upon that point the court found that "on the 13th day of June, 1896, Crane, Kasser, Gessell and Grandstaff attempted to locate a mining claim embracing substantially the same property as that located by the defendants, which attempted location was not sufficient to withdraw the same from the public domain of the United States, and that the locators thereof were not in possession of said property on the 4th day of September, 1896."

The assignment of error and the argument of appellant related principally to the judgment of the court being contrary to the evidence in the case, and urged particularly the existence of the Damfino claim at the time the Skull claim was attempted to be located.

2. It is well settled by numerous decisions, and by our own court, that when a location has once been made the ground covered thereby is not public mineral land open to location, and no one can make any other location thereon so long as the first location is a subsisting one; so, if appellant's contention that the Damfino claim was existing at the time the Skull claim was located be true, the finding of the court would be erroneous. We have made a careful examination of the evidence in regard to the location of the Damfino mining claim, and of the acts of the parties whose names were connected with the location after the date the location notice bore. Grandstaff alone made the location, and wrote the names of the other co-locators to the location notice. None of those whose names are on the location notice ever did anything, or ever attempted to do anything, except Grandstaff and Gessell, and none but Grandstaff and Gessell seemed to know anything about the claim, or, in fact, to know that their names were on the location notice. Grandstaff says that he "made a little monument, and put the notice in it, and built another one right above it; that he sunk about three feet; that one of his partners [Gessell] came down and looked at

it, and they both decided that it was no good, and destroyed the monument, and that that was all that was ever done on the claim; that the claim was abandoned because it was no good; that, in two or three days after he had written the notice and built the monument, he went away, and left the territory, with the intention of having nothing further to do with that claim, as he regarded it of no account. Gessell and myself both abandoned the claim. The others never did anything with it." Abandonment has always rested in intention, as well as in acts accompanying the intention. Under the statute, a locator of a mining claim may have 90 days in which to sink his discovery shaft, record his notice, and build his monuments; yet if, after putting up the initial monument and examining the claim, he wishes to abandon it, and does tear down the monument and go away with the intention of not going back, and in fact pays no further attention to the claim, the land covered by the claim is open to location the moment such act takes place and such intention is formed, and others, wishing to relocate the ground, would not be required to wait until it became forfeited by reason of a non-compliance with the statute in sinking a discovery shaft, recording the notice, and building monuments..

3. Objection is made by appellant to the introduction of the location notice of the Skull mining claim by appellees, and, because it was received as evidence, she assigns error. By looking at the record we discover that appellant brought her action before the expiration of the time allowed by statute for the filing of the notice of location with the recorder; and hence, when appellant attacks the location of the Skull claim, appellees would have to show only the acts of location, independent of a certificate of location. Sess. Laws 1895, Act No. 42, § 1, prescribes:

"Every notice of a location of a mining claim shall contain: 1st. The name of the claim located. 2nd. The name of the locator. 3rd. The date of the location. 4th. The number of feet in length

of said claim and the number of feet claimed on each side of the center of the discovery shaft, lengthwise of the claim. 5th. The general course of the lode, deposit or premises located. 6th. The locality of the claim with reference to some natural object or permanent monument as will identify the claim."

Section 2 provides that a certificate not containing these things shall be void, which, by inference, means that, if it does contain these things, it is valid. Let us see the location notice:

"Notice is hereby given that the Skull mining claim, containing mineral bearing quartz, rock, or earth in place, located by James A. Fleming and J. M. Ford, on this 4th day of September, 1896, has been located for mining purposes. Said claim is 1,500 feet in length; and we claim 300 feet on each side of the center or discovery shaft, for the full length of the claim. The general course of this lode deposit or premises is easterly and westerly. This claim is situated in Globe mining district, Gila county, territory of Arizona, about six miles in a westerly direction from Globe, about one-half mile south of the junction of Webster and Lost gulches, and lays just east of the Joyce Mine."

It is signed by James A. Fleming and J. M. Ford, locators, contains the file mark of December 3, 1896, which is within the 90 days from date of location, and after the suit by appellant was commenced. It is readily to be seen that every specification of the statute has been complied with. It is true the position of the monuments as built upon the ground was described in such a way as to direction as to be confusing; but, if the statutory requirements were complied with, the notice would be sufficiently correct to allow its admission as evidence when offered by defendant. It has been repeatedly held that a mine referred to by name, as was the Joyce mine, is a permanent monument, and, if the claim lay just east of the Joyce mine, its position is defined. Referring to a mine in a location notice casts upon the party attacking the notice the burden of showing that there is no such mine as referred to. The evidence of the locator of the

Skull mining claim described particularly and distinctly the nine monuments that were built, marking its exterior boundaries; and, even if appellees could have been called upon to produce their certificate of location in the trial of a suit which had been commenced before the time in which the statute required a location notice to be recorded, we hold, with the district court, that the location notice complied with the statute sufficiently to admit it as evidence. The judgment of the district court is affirmed.

SLOAN and DAVIS, JJ., concur.

SILVER PEAK MINES V. L. J. HANCHETT.

(93 Federal 76. Circuit Court, District of Nevada. March 20, 1899.)

[1]**Alleged abuse of process of the court.** It is ground for dissolution that complainant is doing the same acts which he enjoins the defendant from doing and is abusing the process of the court, but the rule will not be applied where complainant is not removing ore from the enjoined mine and is only working to save the claims from reverting to the government and using the mill only to such extent as to save the insurance policy from forfeiture.

Facts of the case. As ancillary to an action at law, the owner of a mine filed a bill for injunction against one claiming the right of possession; and defendant was enjoined not to operate the mine, or interfere with the mining property, or commit trespass, waste, or nuisance. Subsequently an agent of defendant in charge of the premises turned them over to complainant. Complainant afterwards extended a tunnel for the purpose of performing the annual assessment work, the ore so extracted remaining on the dump; and, to avoid a forfeiture of a policy of insurance covering a quartz mill, complainant kept a watchman on the premises. *Held*, that the acts of complainant tended to preserve the property, and hence the injunction would not be dissolved.

This is a bill by the Silver Peak Mines, a corporation, against L. J. Hanchett. An injunction issued as prayed, and defendant now moves to dissolve the same.

[1]Working ground for exploration purposes will not be enjoined. *St. Louis Co.* v. *Montana Co.* 17 M. R. 658.

A mere technical or trifling violation of a mining injunction ought not to be punished as a contempt. *Boston Co.* v. *Montana Co.* 20 M. R. 492.

Debris from placer ditch will not be enjoined where complainant refuses offer to protect. *McCann* v. *Wallace*, 117 Fed. 936; 22 M. R. —.

Injunction refused where more damage to defendant than gain to plaintiff. *Copper King Co.* v. *Wabash Co.* 114 Fed. 991; 22 M. R.—.

Injunction will not be allowed in simple trespass where no real damage is being done. *King* v. *Mullins*, 27 Mont. 364; 71 Pac. 155.

Sinking a barren shaft by a solvent party is not a destructive

M. A. MURPHY, for complainant.

REDDY, CAMPBELL & METSON, for defendant.

HAWLEY, District Judge (orally). On the 22d day of May, 1897, the complainant filed its bill in equity, as ancillary to an action at law commenced by said Silver Peak Mines against the defendant, L. J. Hanchett, asking for the restitution and possession of certain mining property and premises situate at Silver Peak, Esmeralda county, Nev. On the same day complainant obtained an injunction against L. J. Hanchett, which reads as follows:

"And it is further ordered by this court that until the further order of the court, or the judge thereof, in the premises, you, the said L. J. Hanchett, the defendant above named, and all your attorneys, agents, assistants, servants, employes, and all persons acting for you or on your behalf, and each and every one of you, do absolutely desist and refrain from mining or extracting ores in or from the mines mentioned in the complainant's bill of complaint on file herein, or from removing or working the same, and from removing or working any ores now extracted or being on the dumps of the said mining claims, and from removing any of the earth, tailings, or slimes on the land or premises mentioned in

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enjoinable trespass. *Harley* v. *Montana Co.* 27 Mont. 388; 71 Pac. 407.

A licensee may be entitled to an injunction against a trespasser taking the ore which he has the sole right to remove. *Lytle* v. *James*, 98 Mo. App. 337; 73 S. W. 287.

A court of equity will enjoin one who under a void lease drills oil wells. *Haskell* v. *Sutton*, 53 W. Va. 206; 44 S. E. 533.

Against pipe line denied where expenditures have been allowed and the damage to the surface inconsiderable. *Consumers' Co.* v. *American Co.* (Ind.) 68 N. E. 1020.

A party bought land with notice through his agent, that it was under lease and there was in fact a producing gas well upon it: *Held*, that ejectment was his only remedy to recover possession and that he had no case for injunction. *Hicks* v. *American N. G. Co.* 207 Pa. 570; 57 Atl. 55.

The production of natural gas by a lessee under covenants for strict measurement and short payments is not a case of irremediable injury. *Id.*

the complainant's bill of complaint, or from working the same and extracting the gold and silver therefrom, and from running or in any manner using the quartz mill mentioned in complainant's bill of complaint, and from disposing or removing any of the machinery belonging to, or in any manner connected with, said quartz mill, or situate therein, or * * * upon or connected with said premises mentioned in said complainant's bill of complaint, and from committing any trespass, waste, or nuisance whatever on said premises."

On March 10, 1899, notice thereof having been previously given, the defendant, L. J. Hanchett, moved the court to dissolve said injunction, and for an order directing the complainant "to restore to the defendant the possession of all the real and personal property in the bill of complaint herein described, and all the personal property thereon and appurtenant thereto," upon the following grounds, viz.:

"(1) That the complainant itself has, through its agents, servants, and employees, since the issuance of said injunction and restraining order, violated the same, and entered upon the mining ground, lands, and premises, in said complaint mentioned, and mined and extracted gold and silver bearing ore, rock and earth therefrom, and took and converted the same to its own use. (2) That the complainant has, since the commencement of this suit, and the issuance of the injunction and restraining order, forcibly entered upon the mining ground, lands, and premises in complaint described, and ousted and ejected defendant therefrom, and has ever since, and does now, by force hold possession thereof, and exclude defendant therefrom. (3) That the complainant has abused the process of the court, and has itself not respected and obeyed said injunction and restraining order. (4) That complainant has, by means of said injunction and restraining order, and under the protection thereof, forcibly and wrongfully taken from defendant possession of all the property in said bill of complaint mentioned."

This motion was made upon affidavits filed by the respective parties, and upon the papers and pleadings on file and of record in the suit.

Underlying all the points herein raised is the question whether L. J. Hanchett has any such interest in the property as entitles him to make the motion. His interest, if any, or

whatever it may be, is derived by virtue of a written contract or agreement for the purchase of the property by him from the Silver Peak Mines, entered into between the parties on the 7th day of September, 1894, and an extension of the time for compliance with the original agreement, entered into on the 12th day of November, 1895, extending the time until the 12th day of August, 1896, and the acts of the respective parties in regard thereto. The question as to Hanchett's interest is important. It is raised and presented in the law case, which is soon to be tried. No opinion in regard to this matter will be expressed or intimated on this hearing. The motion will be disposed of on other grounds.

It will be noticed that the injunction issued in this case is only against the defendant, L. J. Hanchett. The effect of the injunction was to restrain him from the commission of the acts mentioned in the injunction. It did not restrain the complainant from the commission of any act. There are, however, numerous and well-considered cases where the courts have held that, although the complainant was not restrained, he could not "with impunity do the acts which at his instance the defendant has been restrained from doing," and that, where the evident object and purpose of the writ are to preserve the existing status of the property involved in litigation until a final trial and adjudication can be had, "it is a gross abuse of the process of the court for the complainant, to disregard his own injunction, after having, by means thereof, tied the hands of his adversary." *Vanzandt* v. *Mining Co.*, 48 Fed. 770; *Haight* v. *Lucia*, 36 Wis. 355, 361; *Mowrer* v. *State*, 107 Ind. 539, 543, 8 N. E. 561; 10 Am. & Eng. Enc. Pl. & Prac. 1104. There is no doubt, therefore, that upon a proper showing to the effect that a complainant is not acting in good faith, and has either sought for and obtained, or uses, an injunction for the purpose of enabling him to obtain an undue advantage over the opposing party, the court could and should interfere to prevent

the commission of any act by the complainant having that tendency by restraining him, as well as the defendant, from doing such acts, or any act that would materially disturb the existing status of the property in litigation; or, as is held in some of the authorities above cited, the court might dissolve the injunction against the defendant. But in connection with the rule above mentioned the law is equally as well settled, as stated in 10 Am. & Eng. Enc. Pl. & Prac. 1104, that "an order of injunction, prohibiting any disturbance of or interference with the status of property pending litigation concerning it, does not prevent any party having an interest in such property from doing whatever is reasonably necessary for its preservation." *Behrens* v. *McKenzie,* 23 Iowa, 333, 341; *Mowrer* v. *State, supra.*

With reference to these general principles, the facts presented to the court will be examined. It is proper to state that there is a mass of irrelevant matter included in the affidavits on both sides that will not be noticed, and upon some of the other facts there is a direct conflict.

It appears, to the satisfaction of the court, that Hanchett was in possession of, and claimed to be entitled to the possession of, the property, after the expiration of the second agreement extending the time of his right or option to purchase the property; that, within a few months after the service of the injunction upon him, he left Nevada, and went to California, where he resides; that when he went away, he placed one Louis Tietjen to act as his agent in charge of the mining property and certain mining tools; that said Tietjen soon thereafter left the premises, assigning as the reason therefor that he had not been paid by Hanchett; that the said Hanchett also placed Frank Gillespie and Fred Kelly in possession and charge of the stone house, assay office, and mill; that said parties, acting as Hanchett's agents, entered upon the possession of some or all of said property; that both of said parties, prior to the filing of the

notice to dissolve the injunction herein, voluntarily went away from Silver Peak, and have not returned; that in October, 1898, the said Kelly notified S. R. Wasson, the agent of complainant, that he was going to leave Silver Peak, and, at the request of said Wasson, delivered to him the key to the stone building, which was occupied by Hanchett during the time he resided at Silver Peak (the house in which Wasson had been living being in a dilapidated condition, and not fit for further occupancy); that Wasson, with the assistance of Kelly, moved his furniture into the stone building, and stored most of the personal property therein belonging to Hanchett in a secure and safe place, and thereafter notified Hanchett that he would purchase the balance of the personal property, if Hanchett would sell the same for what it was worth, and that, if Hanchett did not wish to sell the same, he would see that it was properly packed up, and stored in a safe and secure place; that during all the time mentioned herein the said S. R. Wasson was, and for many years prior thereto had been, and still is, in the general charge of all the property of the Silver Peak Mines, the corporation complainant herein, as its agent to care for and protect said property against trespassers, etc.; that Hanchett, during his possession of the property under the contracts before stated, commenced the running of a certain tunnel, as he was authorized to do, and ran the same for the distance of 300 feet, or thereabouts; that Wasson, after Hanchett left the premises, went into said tunnel, and ran the same for a distance of 250 feet or more, into the Drinkwater and Crowning Glory lodes, for the purpose of performing the annual assessment work upon the unpatented mines in the Silver Peak group owned by complainant, and which was necessary to be done in order to comply with the laws of the United States, in order to prevent forfeiture of its rights in said mines, and subject them to a re-entry and location by outside parties; that no ore was extracted from said mines, except such as was neces-

sarily taken out in the running of said tunnel, and all the ore that was extracted remains upon the dump; that no ore has been removed from the property, or converted by the complainant to its own use; that the mill upon said property is insured by the complainant, and, by a clause in the policy, the mill must be "continually watched, night and day," or the policy will be subject to forfeiture, and, to save the life of the policy, complainant has employed a watchman to care for and watch said mill.

I am clearly of opinion that the case, as presented, does not come within the first general rule, but does come within the second rule, hereinbefore announced. The case, in its facts, is essentially different from the cases cited and relied upon by defendant's counsel. One illustration is sufficient. In *Haight* v. *Lucia,* both parties claimed to be owner of the land in dispute, which was chiefly valuable for the timber situate thereon. After the plaintiff obtained an injunction against defendant from committing any waste on the land, he, immediately after the service of the injunction upon defendant, entered upon the land, with a number of employees, and cut down a large quantity of timber; thus destroying the substance of the estate. The acts performed by the complainant in this case tended to preserve, instead of to injure or destroy, the property. The evidence falls far short of establishing the fact that Hanchett has been, by force or otherwise, ejected from the premises, or any part thereof. In this respect the present case is clearly distinguishable from *Vanzandt* v. *Mining Co., supra.* Moreover, the complainant is the unquestioned owner of the property described in the bill of complaint herein. It certainly has the right to protect and preserve its own property, and prevent any loss thereof or injury thereto. Hanchett does not own the property. He has no title thereto. All he claims is the right of possession which he obtained by virtue of the contract or contracts giving him an option to purchase the

property, within the time specified therein, at a stipulated price. He did not comply with the covenants on his part agreed to be performed, and in his answer claims that he was prevented from so doing by various acts of the complainant. The question whether, after the time specified in the contracts, Hanchett was in possession of the property by virtue of said contracts, or other agreements or conduct between the parties thereto, as claimed by the defendant, or was simply allowed to remain in possession of said property by the mere sufferance of the complainant, as claimed by it, will arise upon the trial of the action at law, where all the evidence in regard thereto can be fully presented, heard, and determined; and it will not, therefore, be here discussed.

From the facts presented on this hearing, it is clear that the defendant is not entitled to any relief upon this motion. The motion is denied.

DURANT MINING CO. v. PERCY CONSOLIDATED MINING CO.

(93 Federal 166. Circuit Court of Appeals, Eighth Circuit. March 20, 1899.)

[1]**Intent controls. Value of ore in place.** While one who willfully and intentionally takes ore from another's mine is not entitled to deduction from the value thereof for labor bestowed, where the taking was inadvertent, and under an honest mistake as to the ownership of the land, only the value of the property in its original place can be recovered.

Where a trespasser fails to use ordinary care to ascertain the boundary line between his land and that on which he entered, the jury may infer that the trespass was intentional.

Instruction on intent. Where the evidence as to the defendant's intent in taking ore from another's land adjoining his mine was conflicting, an instruction that, if defendant had been negligent in failing to discover the location of his property, he was estopped to say that the taking was not willful or intentional, was erroneous.

An erroneous instruction is presumed to be prejudicial, and is not cured by a correct direction in another part of the charge.

A general verdict on an erroneous instruction cannot stand, where there are two theories on which the jury might have found it, under one of which the instruction was harmless, while under the other it was error, since error is presumed to be prejudicial, and it cannot be said on which theory the verdict was based.

Ore taken by third person. In an action for taking ore from another's mine, evidence that an unknown third person, after the commencement of the suit, took out ore, was not competent to prove defendant's trespass to have been willful.

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[1]Oil taken under bona fide claim of title, value as found in the earth. *Dyke* v. *National Co.* 49 N. Y. S. 180.

Interest allowed in ore trespass case. Full royalties allowed. *New Dunderberg Co.* v. *Old,* 97 Fed. 150.

Inadvertent trespasser held to pay value at pit's mouth. *Donovan* v. *Cons. Coal Co.* 187 Ill. 28; 21 M. R.

Only compensatory damages where gas was taken in good faith. *Gerkins* v. *Kentucky Co.* 23 Ky. L. R. 2415; 22 M. R. —.

Test between trespass, whether willful or innocent depends on the intent. Following advice of counsel shows good faith. *U. S.* v. *Homestake Co.* 117 Fed. 481; 22 M. R.—.

Where parties take out ore as mortgagees in possession or equitable owners they are entitled to all expenses of working and com-

In Error to the Circuit Court of the United States for the District of Colorado.

The La Salle and the Stilwell lode mining claims joined each other. The Durant Mining Company, a corporation, the plaintiff in error, and the owner of the Stilwell claim, removed some ore from a stope many hundred feet beneath the surface of the earth, which proved to be on a line between the two claims, so that about 43 per cent. of the ore taken from it was on the La Salle claim. The Percy Consolidated Mining Company, a corporation, and the owner of $^{31}/_{32}$ of the Lasalle claim, sued the Durant Company for willfully and intentionally extracting ores from its claim of the value of $50,000. The Durant Company denied that it had taken any ore belonging to the Percy Company, denied the charge of willful trespass, and alleged that, if it had extracted any ore from the La Salle claim, it had done so inadvertently, and in the honest belief that it was mining on its own ground. On the trial it was conceded that the Durant Company had taken valuable ores from the La Salle claim, but it insisted that it had done so believing that it was its own ore, and the evidence on the question whether the trespass was inadvertent or intentional was so conflicting that it would have sustained a verdict either way. The jury found a

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pensation for improvements. *Wasatch Co.* v. *Jennings*, 14 Utah 221; 46 Pac. 1106.

In inadvertent trespass it is the value of the thing removed as part of the realty and not as a chattel. *Warrior Co.* v. *Mabel Co.* 112 Ala. 624; 20 So. 918.

No damages for removing culm dump, the culm having absolutely no value. *Morris Co.* v. *Delaware Co.* 190 Pa. 448; 42 Atl. 883.

No deduction for cost of mining in case of willful trespass. *Benson Co.* v. *Alta Co.* 17 M. R. 488. *Sunnyside Co.* v. *Reitz*, 14 Ind. App. 478; 39 N. E. 541; 43 N. E. 46.

The plaintiff may not show the amount of ore taken by proof of how much each man on an average would mine per day—but an expert may testify as to what amount should have been taken out of stopes by proof of assay value and measurements of spaces broken. *Golden Reward Co.* v. *Burton Co.* 97 Fed. 413.

Where one tenant in common in good faith, extracts the coal the measure of damage to his co-tenants is the value in place. *Keys* v. *Pittsburg Co.* 58 Oh. St. 246; 50 N. E. 911.

Value of marble in place as it existed before quarrying, where taken under bona fide belief of right. *Dougherty* v. *Chesnutt*, 86 Tenn. 1; 5 S. W. 444.

Lessee may recover for ore taken by an adjoining lessee crossing

general verdict for the defendant in error for $11,431.25, and the testimony relative to the value of the ores removed disagrees to such an extent that it is not possible to determine from the verdict whether the trespass was willful or innocent. It is the judgment upon this verdict that has been removed by the writ of error.

CHARLES J. HUGHES, JR., for plaintiff in error.

W. H. BRYANT and WILLIAM O'BRIEN (C. S. THOMAS and H. H. LEE, on the brief) for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). One who unintentionally, and in the honest belief

bounds, to the value of the ore, less cost of mining and less royalty paid to the lessor. *Hartford Co.* v. *Cambria Co.*, 17 M. R. 515.

Defendant held in trover for value of coal when severed, without allowances. *Ivy Co.* v. *Alabama Co.*, 135 Ala. 579, 33 So. 547.

Where the estate of deceased is liable for the profits of a wrongful act, as the taking of coal by trespass, the estate is chargeable with interest from date of decease; but such judgment must be applied for in season. *Phillips* v. *Homfray*, L. R. 1 Ch. (1892) 465.

(This case was evidently an attempt to claim interest on the original adjudications in 1870 and 1871. *Phillips* v. *Homfray*, 14 M. R. 677.)

Tenant in common allowed full share of proceeds without deducting cost of mining where excluded by fraud. *Sweeney* v. *Hanley*, 126 Fed. 97.

A lessee holding over after notice of forfeiture is not a willful trespasser and is to be allowed expenses of mining. *Montrozona Co.* v. *Thatcher*, — Col. App. —; 75 Pac. 595.

On an executory contract of sale, the ore was to be sold and net proceeds applied on the purchase: *Held*, that in computing the net proceeds the cost of mining should be deducted; whether between the parties, or in suit by the owner, to recover ores sold by the licensee. *Hall* v. *Abraham*, — Ore. —; 75 Pac. 882.

Lessee of an oil well from a life tenant, but who claimed to be the owner in fee held in trespass for profits after deducting expenses, with damages for detention. *Crawford* v. *Forest Co.* 208 Pa. 5; 57 Atl. 47.

that he is lawfully exercising a right which he has, enters upon the property of another and removes his ore, his timber, or any other valuable appurtenant to his real estate, is liable in damages for the value of the ore, timber, or other thing in its original place, and for no more. He may limit the recovery of the owner by deducting from the value of the ore at the mouth of the shaft the cost of mining and transporting it to that point; and from the value of the timber at the boom, the cost of cutting, hauling, and driving it to that locality. But one who willfully and intentionally takes ores, timber, or other property from the land of another must respond in damages to him for the full value of the property taken, at the time of his conversion of it, without any deduction for the labor bestowed or expense incurred in removing and preparing it for the market. It is the duty of every one to exercise ordinary care to ascertain the boundaries of his own property, and to refrain from injuring the property of others; and a jury may lawfully infer that a trespasser had knowledge of the right and title of the owner of the property upon which he entered, and that he intended to violate that right, and to appropriate the property to his own use, from his reckless disregard of the owner's right and title, or from his failure to exercise ordinary care to discover and protect them. *Wooden-Ware Co.* v. *U. S.*, 106 U. S. 432, 1 Sup. Ct. 398; *Benson M. Co.* v. *Alta M. Co.*, 145 U. S. 428, 12 Sup. Ct. 877; *Cheesman* v. *Shreeve*, 40 Fed. 787; *Mining Co.* v. *Turck*, 17 C. C. A. 128, 70 Fed. 294, 301; *Whitney* v. *Huntington*, 37 Minn. 197, 33 N. W. 561; *King* v. *Merriman*, 38 Minn. 47, 35 N. W. 570; *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 86, 89; *St. Clair* v. *Milling Co.*, 9 Colo. App. 235, 47 Pac. 466; *Dyke* v. *Transit Co.*, 49 N. Y. Supp. 180; *Hartford Iron M. Co.* v. *Cambria M. Co.*, 93 Mich. 90, 53 N. W. 4; *Warrior Coal & Coke Co.* v. *Mabel M. Co.*, 112 Ala. 624, 20 South. 918; *Ross* v. *Scott*, 15 Lea, 479; *Hilton* v. *Woods*, L. R. 4 Eq. 441; *Refining Co.*

v. *Tabor,* 13 Colo. 41, 21 Pac. 925; *United Coal Co.* v. *Canon City Coal Co.,* 24 Colo. 116, 48 Pac. 1045.

No controversy has arisen over these principles. They are stated to call to mind the rules by which the questions presented must be answered. The complaint here is that the court below went further, and instructed the jury that, if the plaintiff in error was guilty of negligence in discovering the line between its claim and that of the defendant in error, they not only might, but must, find that trespass was willful and intentional. The portion of the charge against which this criticism is leveled reads in this way:

"In addition to what I said on the subject of knowledge, if there was a lack of diligence on the part of the defendant company in ascertaining the location of the line, upon that you may say—That is, if there was negligence in ascertaining the fact, you may say they should be charged with the value of the ore at the mouth of the pit, without reference to the cost of mining and transporting to that place. It is the duty of one who carries on work in his own territory to ascertain the location of his lines. That duty is so strong upon him, if he fails in that respect he is not at liberty to say that he was negligent, or that it was not willful or intentional, and therefore he ought not to be charged more heavily than would be the case if he had exercised proper care and diligence to ascertain where his line is."

Now every trespass upon the land of another that is not willful and intentional necessarily implies some degree of negligence. (*Coal Co.* v. *McMillan,* 49 Md. 549, 559); and a rule which makes the negligent failure to discover the line of the property trespassed upon conclusive evidence of intentional trespass removes all room for the defense of inadvertence and honest mistake. The logical and necessary effect of that portion of the charge of the court which we have quoted was to deprive the trespasser of the defense that its acts were unintentional and innocent. It declared that the mere failure to ascertain the true line between the claim of the Durant Company and that of the Percy Com-

pany was the legal equivalent of knowledge of that line, and of willful intent to cross it, and was conclusive proof of a willful and intentional trespass. If this were a true statement of the law, there never could be an inadvertent and unintentional trespass, for the essential attribute of such a trespass is an innocent failure to know the true line. If there can be no innocent failure, if every failure to find the line is evidence of a willful and intentional trespass, then every trespaser is guilty of a willful trespass, and liable for the full value of the property which he takes, at the time of its conversion, without any deduction for the cost of removing and preparing it for the market. But this is not the law. The only issue in this case, aside from that which arose from the varying estimates of the amount of ore taken, and of the cost of mining it, was whether the taking was willful or inadvertent. This was an issue upon which, under the rules and authorities to which we have referred, the defendant in error was entitled to the finding of the jury. The testimony upon it was voluminous and conflicting, and the effect of the charge was to entirely withdraw it from the consideration of the jury. We are unable to escape from the conclusion that this was a serious error. It is probable that the mistake in this charge arose from the inadvertent application of the rule relative to the ascertainment of the line between properties in actions of trespass or ejectment, in which the lowest measure of damages only is sought, and therefore intent is not material, to this case, in which a higher measure is sought, and the intent became the chief element of the controversy. Where no claim is made for larger damages than the value of the ore or other property taken, in its original place, it is of no importance whether or not the trespass was mistaken. It is no defense in such a case that the defendant carelessly or otherwise failed to discover his line. He is liable for the lowest measure of damages in any event, whether he knew where his line was

or not, and whether his trespass was willful or innocent. In such a case the charge here criticised would not have been improper. *Maye* v. *Yappen*, 23 Cal 306, 307. But in the case at bar it erroneously withdrew the chief defense in mitigation of damages which the plaintiff in error had interposed, and upon which it was entitled to the verdict of the jury.

It is contended that this error is cured because in other portions of the charge the court submitted to the jury the question whether the trespass was willful or inadvertent, and instructed them that their decision of this question would determine whether, in estimating the damages, the cost of mining and transporting the ore should be deducted from its value at the mouth of the shaft. There are two answers to this argument: In the first place, the court had already told them that they must find that the trespass was willful, since it had informed them that, if the plaintiff in error had failed to discover its line, it could not be heard to say that its trespass was not willful, and it was conceded on the trial that it had failed to find the true line; and, in the second place, if this had not been so, the two portions of the charge would have been inconsistent and contradictory, and it would be impossible to determine which the jury followed. The presumption is that error produces prejudice, and the vice of an erroneous instruction is not extracted by a correct direction upon the same subject in another part of the charge. *Railway Co.* v. *Needham*, 3 C. C. A. 129, 147, 52 Fed. 371, and 10 U. S. App. 339.

It is said that the error probably produced no prejudice, because there is *sufficient evidence* to sustain the verdict on the theory that the trespass was not intentional. But, on the other hand, there is *ample evidence* to sustain it on the ground that the trespass was willful. The verdict is general, and we cannot tell on which basis it was rendered. A general verdict on an erroneous instruction cannot stand, where

there were two theories on which the jury might have found it, and under one of which the instruction was harmless, while under the other it was error, because the presumption from error is prejudice, and the court cannot say upon which theory the verdict stands. *Lyons, Potter & Co.* v. *First Nat. Bank,* 29 C. C. A. 45, 85 Fed. 120, and 55 U. S. App. 747, 757; *Coal Co.* v. *Johnson,* 6 C. C. A. 148, 56 Fed. 810, and 12 U. S. App. 490, 495; *Railway Co.* v. *Needham,* 11 C. C. A. 56, 63 Fed. 107, and 27 U. S. App. 227, 237.

The conclusion at which we have arrived renders it unnecessary to consider the other assignments of error in this case. We may remark, however, for the guidance of the court below in the subsequent trial of this case, that the evidence that some ore was taken from the La Salle mine by some unknown person at some time after the commencement of this suit does not appear to us to be competent evidence of the evil intent of the plaintiff in error in committing the trespass charged in the complaint.

There was no error, in our opinion, in refusing to instruct the jury to deduct from the value of the ore the expense of running the cross-cuts or the tunnel in order to reach it. The judgment is reversed, and the case is remanded to the court below with instructions to grant a new trial.

M. J. CURTIS ET AL. v. JOSIAH S. LAKIN ET AL.

(94 Federal 251. Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

Partnership accounting. Trust. Delay amounting to laches. The plaintiffs and the defendant L. entered into a partnership for the purpose of locating, developing, and operating mines. While prospecting under the agreement, L. located two mining claims in his own name, contrary to the agreement; and on July 27, 1894, conveyed a part interest to third persons; and on March 6, 1896, the entire interest in the claims was transferred to the defendant corporation, organized for that purpose, in exchange for stock. The complainants were first advised of the sale of part interest in the claims in 1895, but never communicated with L., for the purpose of obtaining an accounting or ascertaining his intentions. On November 13, 1897, about one year after plaintiffs were informed of the conveyance to the corporation, and two years after the first conveyance, and after the claims had increased in value to an amount exceeding $200,000, and expenditures had been made in developing them, they filed a bill against L. and the corporation, asking for a dissolution of the partnership and an accounting, and that the defendant corporation be decreed a trustee for the benefit of plaintiffs. *Held*, that the plaintiffs had been guilty of laches barring the suit.

Excuse of paper mislaid. The delay of plaintiffs in commencing suit against their co-partner for dissolution and an accounting, and to declare a third person purchasing partnership property from him a trustee, is not excused by the fact that the partnership agreement had been misplaced, and was not found until shortly before the suit was commenced.

Where a trustee of an express trust openly repudiates it, and asserts a title in himself to the trust estate, with the knowledge of the beneficiary, the same diligence should be exercised by the person injured in asserting his right as is required of one asserting a constructive trust, or attempting to rescind a contract on the ground of fraud or mistake.

[1]**Fluctuating value. Allowing expenditures.** One claiming an interest in mining property that is subject to great and sudden fluctuations in value, or the value of which is uncertain, cannot remain silent

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[1] *Johnston* v. *Standard Co.* 17 M. R. 554.

Foundations of the law of laches stated. *Gilmer* v. *Morris*, 80 Ala. 78; 60 Am. Rep. 85.

The defense of laches applies with peculiar force in Mining cases.

and inactive, awaiting developments, while those in possession are expending money in its development, and a court of equity will deny him relief, where he has failed to bring suit within a comparatively short period.

Interest of innocent stock buyers. Partners instituting suit to compel a co-partner to account for the proceeds of partnership property transferred to a corporation in exchange for stock; and to compel the corporation to transfer to them the stock, where it does not appear that the corporation had notice of their claim, and the stock may have been passed into the hands of innocent purchasers, must proceed with reasonable diligence, and, where they have waited a year before commencing suit, relief will be denied.

Sanborn, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Utah.

The bill in this case was filed by M. J. Curtis and A. D. Bowley, the appellants, against Josiah S. Lakin and the Sacramento Gold Mining Company, the appellees, on November 13, 1897, and was subsequently amended on March 8, 1898. In the original and amended bill the following facts were alleged, in substance: On February 1, 1892, Josiah S. Lakin, A. D. Bowley, and M. J. Curtis associated themselves together "for the purpose of locating, developing and operating mines in the states of California, Nevada, and such other states and territories or mining districts that may come to their notice." By the agreement, which was signed on said date at Sacramento, in the state of California, each of said parties agreed to "deposit into one general fund the amount of $500, to be

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Gt. West Co. v. *Woodmas Co.* 12 Colo. 46; 20 Pac. 771; 14 Colo. 90; 23 Pac. 908. *Ernest* v. *Vivian*, 8 M. R. 205. *Twin Lick Co.* v. *Marbury*, 3 M. R. 688.

Laches is a defense to proceedings by the United States to set aside patent. *U. S.* v. *San Jacinto Co.* 23 Fed. 279. *U. S.* v. *Blackburn*, 18 M. R. 684.

Laches need not be pleaded. Fluctuating value of mines considered. *Pratt* v. *Cal. M. Co.*, 24 Fed. 869.

Equity does not favor the purchase of stale demands: The rule applied to defeat attempt to revive a disused lease. *Porter* v. *Noyes*, 47 Mich. 55; 10 N. W. 77.

Bars accounting on prospecting contract. *West* v. *Russell*, 74 Cal. 544; 16 Pac. 392.

The delay of five years to enforce agreement concerning mines during which period they were developed and greatly increased in

drawn upon for the purpose of paying any and all expenses that shall accrue in locating, developing, and operating such mines as may come into the hands of said Lakin, Bowley, and Curtis." They further agreed that, in addition to the general traveling expenses that might be allowed, there should also be allowed not less than one hundred dollars per month for the time occupied by either of the parties to the agreement in locating, developing, and operating mines, or in other business connected therewith, which sum was to be paid out of the general fund. While prospecting under said agreement, Lakin, on March 14, 1892, located two mining claims in Tooele county, Utah, called the "Sacramento" and "Excelsior" claims, which were located, as it was alleged, by Lakin in his own name, contrary to the intent and purpose of the aforesaid agreement. After making these locations, Lakin returned to California in June, 1892, and traveled through that state and the state of Nevada, prospecting for mining claims, which was done at an expense of several hundred dollars, the expenses being paid out of "assets furnished by said partnership." He did not return to Utah until March, 1894, and prior to his return he consulted with Curtis and Bowley, the complainants, about filing notices, as an act of congress provided might be done, in lieu of doing the usual assessment work on said Sacramento and Excelsior claims. Before returning to Utah, Lakin called upon the complainants, and also advised with them as to the expediency of selling the aforesaid claims for the sum of $7,500, saying, in substance, that a party in Utah had offered that sum for the claims. The complainants advised against such a sale; nevertheless Lakin returned to Utah, and on July 27, 1894, sold an undivided one-sixth

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value. *Held*, to bar enforcement of the contract *Johnston* v. *Standard M. Co.* 39 Fed. 304. Aff'd, 17 M. R. 554.

Acquiescence for three years in stream pollution held fatal to injunctive relief. *Clifton Iron Co.* v. *Dye*, 87 Ala. 468; 6 So. 192.

A delay of two years and seven months is fatal in a suit to cancel a sale made in good faith though irregular as to delivery of deed. *Sheffield Land Co.* v. *Neill*, 87 Ala. 158; 6 So. 1.

One day's short notice and sale at low price by the master—two years' delay to set aside, held fatal. *McBride* v. *Gwynn*, 33 Fed. 402.

Delay of 10 months in accepting offer to sell held fatal. *Wenham* v. *Switzer*, 59 Fed. 942.

Stockholder cannot await result of contracts, and then allege *ultra vires*. *Boyce* v. *Montauk Co.* 37 W. Va. 73; 16 S. E. 501.

Co-owners will not be allowed to let their partner take all the risks and then assert their claims after the risk is ended. *Patterson* v. *Hewitt*, — N. Mex. —; 66 Pac. 552.

interest therein for $5,000. On the same day, July 27, 1894, he contracted to sell an additional one-third interest in the claims for $10,000, which latter sale was subsequently consummated, and the money was received by Lakin. The complainants did not hear of the sales aforesaid until the year 1895, when they were informed of the fact, and at the same time heard that the sales had been made by Lakin to obtain funds to develop the property, and that he was developing it. Subsequent to July 27, 1894, the claims were so developed, by Lakin and others to whom he had sold altogether a one-half interest therein, as to make them self-supporting, but when they became self-supporting was not stated. The amount of expenses incurred in developing the claims did not exceed $30,000, of which sum Lakin contributed not more than one-half. The development consisted in part in the construction of a mill of the value of $15,000. Lakin never made any demand on the appellants to furnish money for the development and operation of said claims, although the complainants have always been ready to respond to any such demands; neither has he rendered any statement of his expenditures, nor made any report of his transactions, with respect thereto. On March 6, 1896, the persons to whom Lakin had sold an undivided one-half interest in said claims associated themselves with Lakin and formed a corporation known as the "Sacramento Gold Mining Company" (one of the appellees), to which corporation the Sacramento and Excelsior claims, together with some others, were conveyed in exchange for its capital stock. Said corporation issued 1,000,000 shares of stock, of the par value of $5 each, and Lakin and his

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Grantor having acquiesced for 12 years is not entitled to enjoin the removal of costly improvements. *Potter* v. *Rend*, 201 Pa. 318; 21 M. R.—.

A formal plea is not necessary to raise, in equity, defense of laches, negligence and acquiescence. *Lakin* v. *Sierra Buttes Co.* 25 Fed. 337. *Hagerman* v. *Bates*, 24 Colo. 71; 49 Pac. 139.

Bringing suit does not relieve from laches if plaintiff fail to diligently prosecute the same. *Johnston* v. *Standard M. Co.* 17 M. R. 554. *Hagerman* v. *Bates*, 24 Colo. 71; 49 Pac. 139.

Delay for years after known repudiation of trust bars action. *Mantle* v. *Speculator Co.*, 27 Mont. 473; 71 Pac. 665.

One year's delay fatal on speculative purchase of stock in new patent company. *Benton* v. *Ward*, 59 Fed. 411.

Excuses for Laches.

Lapse of time does not count as laches where during a long portion of it the parties were endeavoring to compromise and only a short time elapsed since the right was denied and suit became necessary. *Compo* v. *Jackson Iron Co.* 49 Mich. 39; 12 N. W. 901.

Knowledge that the mine had appreciated is nothing, if the com-

wife together received one-half of the stock, or, in the aggregate, 500,000 shares, in exchange for one-half interest in the Sacramento and Excelsior claims. Lakin became the president of said company when it was organized, and also a director therein. The complainants had no knowledge of the action of said Lakin in forming said company "until about one year before the bringing of this suit." When they acquired such knowledge, the alleged partnership agreement of February 1, 1892, had been misplaced, and could not be found, and for that reason the complainants believed that they could not successfully maintain a suit to recover their alleged interest in the claims. The agreement was found, however, in the summer of 1897. The value of the Sacramento and Excelsior claims now exceeds $200,000, and ores have been extracted therefrom of a value exceeding $50,000. In view of the allegations contained in the bill, which have been stated, in substance, the complainants prayed for the dissolution of the alleged partnership; for an accounting, both as against Lakin and the Sacramento Gold Mining Company, with respect to all transactions concerning the aforesaid claims; that the Sacramento Gold Mining Company be deemed to have accepted a conveyance of a one-half interest in the Sacramento and Excelsor claims with knowledge of the complainants' equities; and that it be decreed to hold 333,333 shares of its capital stock

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plainant did not know until just before suit that he had been cheated. *Bowman* v. *Patrick*, 36 Fed. 139. Rev'd on facts, 149 U. S. 411.

Non-residence of party to be notified excuses some delay. *Booth* v. *Smith*, 117 Ill. 370; 7 N. E. 610. *Fellows* v. *Hyman*, 33 Fed. 313.

Outlays made by the lessees of the owner do not aid the defense of laches in a suit against the owner. *Crawford* v. *Moore*, 28 Fed. 824.

Laches cannot be invoked by the party out of possession against the party in possession, in specific performance case. *Coffee* v. *Emigh*, 15 Colo. 184; 25 Pac. 83.

Where a mine had been salted and plaintiff spent a year in making tests and finding proof of the salting, held no laches nor such a dealing with the property as amounted to waiver. *Mudsill M. Co.* v. *Watrous*, 18 M. R. 1.

Full consideration of, as to pleading excuses for, etc. *Hagerman* v. *Bates*, 24 Colo. 71; 49 Pac. 139.

No time runs as long as fraud undiscovered. *Kelley* v. *Boettcher*, 85 Fed. 55.

Delay alone, conditions not being altered, is not laches. *Farris* v. *Wirt*, 16 Colo. App. 1; 63 Pac. 946.

Laches, to assert his equitable title, is not chargeable against a party in possession, since his possession is notice of his rights. *Nutter* v. *Brown*, 51 W. Va. 598; 42 S. E. 661.

in trust for the complainants, and that it be compelled to issue to them the usual certificates for that amount of stock. The circuit court sustained a demurrer to the bill, and eventually ordered that it be dismissed.

JAMES M. DENNY, for appellants.

HIRAM E. BOOTH (E. O. LEE and MORRIS L. RITCHIE, on brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The bill of complaint is disingenuous, in that it fails to state certain facts with that degree of fullness and accuracy which a court of chancery has a right to expect in a case of this character and magnitude, and in that it fails to give information concerning the plaintiffs' conduct in certain respects and on certain occasions, which obviously might have been given had the pleader been disposed to make a frank disclosure of all the material facts and circumstances touching the transactions out of which the controversy arises, and on which the plaintiffs' right to equitable relief depends. For example, the bill does not state the amount of money or property which the plaintiffs advanced to create the general fund which was to be used for the benefit of the alleged partnership, the allegation in that respect being simply that they "contributed to the assets of said co-partnership by furnishing Lakin with money and supplies to travel," etc. It fails to show whether the plaintiffs ever made any complaint to Lakin, in person, because he located the Sacramento and Excelsior claims in his own name, or whether they ever demanded a conveyance to themselves of their alleged interest therein. It fails to allege at what time during the year 1895 the plaintiffs ascertained that Lakin had sold an

undivided one-half interest in said claims for the sum of $15,000, or from what source the plaintiffs derived such information; and what is of more importance, perhaps, the bill does not show that the plaintiffs ever communicated with Lakin after being advised of the sale, or that they attempted to do so, for the purpose of obtaining an account of his stewardship, or of ascertaining what he proposed to do with the mining claims in future, although the sale appears to have been contrary to their wishes, and was made as early as July 27, 1894. The bill does not disclose that the plaintiffs have communicated with their alleged partner in any form, or he with them, at any time since March, 1894, when he left Sacramento for the purpose of going to Utah; while it appears that they waited for about one year before bringing this action, after they were advised that the mining claims in controversy had been conveyed by Lakin and his associates to a corporation, and were therefore aware that the stock of the corporation was liable to be placed upon the market, and pass into the hands of innocent purchasers at any moment. It is not even averred that the stock issued to Lakin which the plaintiffs seek to recover is still in his hands, or that any efforts were made prior to the filing of the bill to prevent him from disposing of the same for value to third persons. Besides, the excuse which is given in the bill for waiting a year or more after the mining claims were conveyed to the corporation, before bringing a suit or taking any other steps to preserve their right to the property, is unsatisfactory, and therefore insufficient. It is somewhat remarkable, to say the least, that an agreement, upon which the plaintiffs' right to a large interest in a mine, supposed to be of great value, depended, should have been misplaced, and not found for a year, and that intelligent business men should have supposed that the loss of the agreement would necessarily prevent them from establishing their right to an interest in the Utah claims, and that no effort was made in the meantime

to obtain from their alleged co-partner other recognition of their interest in the property. In short, the allegations of the bill, in the respect last mentioned, are so vague and unsatisfactory, and the failure of the plaintiffs to disclose whether they have ever held personal communication with the defendant Lakin since 1894, and demanded from him an account or an explanation of his conduct and purpose, is so significant, that we are forced to infer that, for at least two years prior to the filing of the bill, the plaintiffs were well aware that Lakin intended to assert a right to dispose of the Utah claims as his own, without accountability to any one. The facts stated in the complaint, no less than those which might have been stated, but are left undisclosed, leave little room for doubt that Lakin's intentions with respect to the Utah mines, and his assertion of an absolute title thereto, have been well known to the plaintiffs at least since 1895, when they learned that he had sold a half interest therein for $15,000, and had appropriated the proceeds. Men of average intelligence and business sagacity would not ordinarily permit mining property in which they had a large interest, and which they believed to be valuable, to be sold and otherwise dealt with by a third person as his own, without remonstrance on their part, and without seeking for an explanation, unless they were well aware that he asserted a legal right to so deal with it, and that any remonstrance on their part or attempt to obtain a recognition of their rights would be vain and useless, unless it took the form of a suit to enforce their alleged rights. We think, therefore, that the conclusion is well warranted by the allegations of the bill that for more than two years before it was filed the plaintiffs remained silent and inactive, knowing that Lakin claimed the Utah mines as his own, yet intending to assert a title thereto in case they proved to be productive and valuable, but to deny all interest therein and all liability for obligations which Lakin might incur in attempts to develop them,

provided they proved to be barren and valueless. This seems to be the only reasonable explanation of the plaintiffs' silence and inaction for a period of two years or more, in view of facts that were then well known to them, when their actions are judged by the tests which are usually applied to determine the motives which prompt human conduct.

It results as a matter of law, from the views which we have thus far expressed with reference to the allegations of the bill, that it was filed too late to obtain redress, for the alleged grievances, in a court of chancery. It may be conceded, for present purposes, that the agreement of February 1, 1892, between the plaintiffs and Lakin, created a co-partnership, and that the Utah claims were located thereunder, and that the title thereto, when taken by Lakin in his own name, was held by him in trust for the benefit of himself and his co-partners. Nevertheless, when the plaintiffs were advised, by Lakin's conduct with respect to the claims, that he intended to repudiate the trust and treat them as his own, they were bound to assert their rights with reasonable diligence. The rule that lapse of time will never bar the enforcement of an express trust is applicable to those cases where there has been no repudiation of the trust, or where the beneficiaries have no reasonable ground to believe that the trust has been or will be denied. *Wood* v. *Carpenter,* 101 U. S. 135, 141; *Oliver* v. *Piatt,* 3 How. 333, 411; *Hunt* v. *Patchin,* 35 Fed. 816, 819, 820; *Miles* v. *Thorne,* 99 Am. Dec. 390, 391. When a trustee of an express trust openly repudiates it, and asserts a title in himself to the trust estate, and the fact of such repudiation becomes known to the beneficiary, we are aware of no reason why the same degree of diligence should not be exercised by the injured party in making complaint and in asserting his rights which courts of chancery always require to be exercised when a litigant seeks to fasten upon another a constructive trust or to rescind a contract upon the ground of fraud or mistake. The reasons requiring the exercise of

diligence in the latter class of cases have been stated many times with great clearness and force, and they are no less applicable to the former class of cases than to the latter. *Naddo* v. *Bardon,* 4 U. S. App. 642, 681, 2 C. C. A. 335, and 51 Fed. 493; *Godden* v. *Kimmell,* 99 U. S. 201; *Wood* v. *Carpenter,* 101 U. S. 135, 139; *Lemoine* v. *Dunklin Co.,* 10 U. S. App. 237, 239, 2 C. C. A. 343, and 51 Fed. 487; *Galliher* v. *Cadwell,* 145 U. S. 368, 373, 12 Sup. Ct. 873; *Kinne* v. *Webb,* 12 U. S. App. 137, 144, 4 C. C. A. 170, and 54 Fed. 34; *Scheftel* v. *Hays,* 19 U. S. App. 220, 225, 226, 7 C. C. A. 308, and 58 Fed. 457; *Wetzel* v. *Transfer Co.,* 27 U. S. App. 594, 12 C. C. A. 490, and 65 Fed. 23; *Id.* 169 U. S. 237, 241, 18 Sup. Ct. 307.

Special reasons existed in the case in hand which required the plaintiffs to be prompt in the assertion of their rights when they became aware that Lakin claimed the Utah property as his own. In the first place, the property consisted of mining claims, which were subject to great and sudden fluctuations in value, and the rule is that one claiming an interest in property of that nature must take steps to establish his title with all convenient speed, if he has reasonable grounds to believe that such asserted interest will be denied by those in possession of the property who are at the time engaged in developing it. In cases of the latter kind, courts of equity will refuse to grant relief if the complainant has failed to bring suit for a comparatively short period after the denial of his rights became known to him, unless a good excuse is offered for such delay; and they will more readily hold that the cause of action is barred by laches if it appear that the failure to sue was occasioned, in whole or in part, by a desire on the part of the complainant to ascertain how development work in progress on the property would affect its value. Where delay is occasioned by motives of the latter sort—that is, by waiting to see whether developments undertaken by

those in possession will be successful or otherwise—a litigant is justly chargeable with bad faith, which courts of chancery always aim to discourage. *Oil Co.* v. *Marbury,* 91 U. S. 587, 592, 593; *Johnston* v. *Mining Co.,* 148 U. S. 371, 13 Sup. Ct. 585; *Clarke* v. *Hart,* 6 H. L. Cas. 633, 656; *Bush* v. *Sherman,* 80 Ill. 175.

In the second place, the conveyance of the Utah claims to a corporation, and the issuance of a large quantity of stock representing their value, was an act which made it the duty of the plaintiffs to be prompt in asserting their rights, to protect third parties from loss and damage which they might possibly sustain by purchasing the stock. According to the averments of the bill, the defendant corporation, when it accepted a conveyance of the Sacramento and Excelsior claims, had no notice of the plaintiffs' alleged interest therein, except such as was imputable to it from the fact that Lakin became the president of the corporation and one of its directors. It is not averred that the persons to whom Lakin sold a one-half interest in the claims in the year 1894, and who subsequently conveyed their interest to the corporation and joined in its formation, were advised of the plaintiffs' alleged interest at the date of either of said transactions, and, in the absence of such knowledge, it is obvious that they, as well as all other persons who may have acquired stock in the corporation by purchase from any of the original promoters, are entitled to full protection against the claims which are now asserted by the plaintiffs, and that they ought not to be subjected to the costs of litigation in defense of their rights. In addition to an accounting, the relief sought, as against the corporation, is that it be compelled to issue fully one-third of its capital stock to the plaintiffs, all of which stock was issued on the organization of the company at least one year before this suit was instituted, and the bill does not show that it is possible to afford such relief without in-

jury to numerous third parties into whose hands the stock in question, or a large portion of it, may have passed during the period which elapsed before the bill was filed.

For the reasons stated, we are of opinion that the plaintiffs have been guility of such negligence in the assertion of their rights, in the light of known facts which should have inspired earlier action, that their bill ought not to be entertained by a court of equity. The decree below is accordingly affirmed.

SANBORN, Circuit Judge (dissenting). This is a bill brought by the appellants against their co-partner Lakin for a dissolution of the partnership and for an accounting. It is not material here that they sought other relief against other parties, for the demurrer cannot be sustained if they are entitled to any relief against any party. The question is therefore whether or not, by a delay of two years after they discovered the faithlessness of their co-partner, they are estopped by laches from obtaining an accounting or any other relief from him. The appellee Lakin held the partnership property in his own name, in trust for his partners and himself. No time runs against an express trust, until it is openly repudiated, and notice of the repudiation is brought home to the *cestuis que trustent.* *Speidel* v. *Henrici,* 120 U. S. 377, 386, 7 Sup. Ct. 610; *Swift* v. *Smith,* 25 C. C. A. 154, 159, 79 Fed. 709, 714, and 49 U. S. App. 188. It is conceded in the opinion of the majority that notice of the repudiation of this trust was not received by the appellants until two years before this suit was commenced. The statutes of Utah, as construed by its supreme court, expressly permit *cestuis que trustent* to maintain an action for an enforcement of the trust, against a trustee who has repudiated it, for four years after the repudiation becomes known to them, when the trust was created by a written agreement, as in the case at bar. Rev. St. Utah 1898, §§ 2876, 2883; *Thomas* v. *Glendenning,* 13 Utah 47, 53, 56, 44 Pac. 652, 654, and cases there cited.

In support of the view that this suit is barred by laches in two years after the partner Lakin repudiated his trust, although the statutes of Utah permit such a suit for four years thereafter, the cases for the rescission of contracts for fraud or mistake are cited in the opinion of the majority. It appears to me, however, that the reason which requires the early application of laches to such cases has no application to the suit of partners against their co-partner for an accounting of proceeds of firm property, and that, the reason ceasing, the rule ceases. That reason is that a contract induced by fraud or mistake is voidable, not void, and it appears to be valid. The parties to it and others may change their position, and incur liability to loss in reliance upon its validity. Hence he who would avoid it must make his attack at once upon his discovery of the fraud or mistake, or he will be estopped by his silence from denying its legality. *Rugan* v. *Sabin,* 3 C. C. A. 578, 580, 53 Fed. 415, 418, and 10 U. S. App. 519, 530, and cases there cited. But the partner who holds the property of his firm in trust, and who disposes of it and appropriates its proceeds to his own use, cannot be deceived or misled by the silence or delay of his partners. He is aware of his relation to them. He knows his liability to them, and it seems to me that there is no sound reason why he should be relieved from responding to it, within the time fixed for its enforcement, by the statute of limitations of the state in which he is sued. In *Naddo* v. *Bardon,* 2 C. C. A. 335, 340, 51 Fed. 493, 498, and 4 U. S. App. 642, 685, Mr. Justice Brewer, in delivering the opinion of this court, said: "It is doubtless true that, where an express trust is once shown to exist, it is presumed to continue, and therefore no lapse of time will defeat an action to enforce rights under it. But when that trust is repudiated, and knowledge of the repudiation is brought home to the *cestuis que trustent,* the case is brought within the ordinary rules of limitation and laches." The doctrine of laches is applied by courts of

equity, in analogy to the statute of limitations at law, to promote, and not to defeat, justice. Under the statutes of Utah cited, the appellants were allowed at least four years, after they learned that their partner had repudiated his trust, in which to institute a suit against him for a dissolution of their partnership and an accounting, and, in my opinion, their delay of two years ought not to be fatal to it. *Bogan* v. *Mortgage Co.*, 11 C. C. A. 128, 135, 63 Fed. 192, 199, and 27 U. S. App. 346; *Kelly* v. *Boettcher*, 29 C. C. A. 14, 21, 85 Fed. 55, 62, and 56 U. S. App. 363, 383.

DIMICK ET AL. v. SHAW.

(94 Federal 266. Circuit Court of Appeals, Eighth Circuit. April 17, 1899.)

A court of equity has jurisdiction and it is its settled practice to enjoin destructive and continuing trespasses.

Circumstances leading to the exercise of that jurisdiction. A circuit court of appeals will not disturb an interlocutory order granting an injunction where the questions of law or fact to be ultimately determined are difficult, and injury to the moving party will be immediate, certain, and great if the relief is denied, while the loss of the opposing party will be comparatively small if it is granted.

Instances of allowance for other than destructive mining or quarrying.

An injunction to restrain the removal of ore may issue although the injury be not irreparable. *Gilpin* v. *Sierra Nev. Co.* 17 M. R. 310.

Equity will enjoin the threatened blowing up of a mine or force against workmen without first establishing title at law. *Rankins App.* (Pa.) 16 Atl. 82.

An injunction will be granted to stay interference with mining gangways. *Montana Co.* v. *Clark*, 42 Fed. 626.

An *ex parte injunction* may issue to enjoin the deposition of tailings; such deposit is not the "ordinary business" of the corporation. *Eureka Lake Co.* v. *Superior Court*, 66 Cal. 311; 5 Pac. 490. *Golden Gate Co.* v. *Superior Court*, 65 Cal. 187; 3 Pac. 628. *Hobbs* v. *Amador Co.* 66 Cal. 161; 4 Pac. 1147. See Mining Rights, 9th Ed. 182.

Injunction against tailings. *Fuller* v. *Swan River Co.* 16 M. R. 252. Against working lode located across line of tunnel. *Hope M. Co.* v. *Brown*, 7 Mont. 550; 19 Pac. 218.

The filling and destroying of trenches and flumes, *Held:* proper case for an injunction. *Power* v. *Klein*, 11 Mont. 159; 27 Pac. 513.

Mandatory writ against water company breaking its contract to supply brewery, compelling it to serve. *Horsky* v. *Helena Co.* 13 Mont. 229; 33 Pac. 689.

Sufficient complaint by surface owner against mine owner for using surface to work coal on other land and flooding same with noxious water. *Hooper* v. *Dora Co.* 95 Ala. 235; 10 So. 652.

Sale of mining stock enjoined on account of fluctuating value. *McLure* v. *Sherman*, 70 Fed. 190.

Appeal from the Circuit Court of the United States for the District of Colorado.

This is an appeal from an interlocutory order granting a temporary injunction restraining appellants from in any manner working the property known as the "Independent Mine," and from extracting or removing ores therefrom, or removing or selling any ores, until the final determination of the cause. The bill charges that the appellee is the owner of a certain large tract known as the "Baca Grant No. Four," his title thereto having lately been determined by the supreme court of the United States in the cause of *Shaw* v. *Kellogg*, 170 U. S., 312, 18 Sup. Ct. 632; that defendants, while said cause was pending in the supreme court, went into possession of the lands in controversy under verbal permission of appellee's manager for the purpose of prospecting only until the final determination of the cause then pending in the supreme court; that after the final determination of that cause, and the decision of the court that appellee was the owner of the tract, appellants were notified to quit the premises, but refused, and since then have commenced mining operations on a large scale in excess of the permission granted to them to prospect, and continue their mining operations and trespasses; that they are insolvent, and, unless enjoined by a court of equity, will commit an irreparable injury to appellee's property. Appellants filed an answer setting up, among other things, the same defenses which had been expressly adjudicated by the supreme court in the case of *Shaw* v. *Kellogg*, *supra*, and also that appellants' manager had verbally given them permission to prospect on the lands for minerals, and, in case of a

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Striking miners enjoined from marching. *Mackall* v. *Ratchford*, 82 Fed. 41.

Tramway across surface of lode claim enjoined. *Connole* v. *Boston Co.* 20 Mont. 523; 52 Pac. 263. Injunction against underground tramway. *Heinze* v. *Boston Co.* 20 Mont. 528; 52 Pac. 273.

Injunction against use of placer water so as to unnecessarily foul stream. *Travis Co.* v. *Mills*, 94 Fed. 909.

Injunction prayed by the buyers of the coal against strikes preventing delivery by the contracting coal companies. *Chesapeake Co.* v. *Fire Creek Co.* 119 Fed. 942.

Plaintiff need not allege irreparable injury. *Chappell* v. *Jasper Co.*, 31 Ind. App. 170; 66 N. E. 515.

Injunction is the proper remedy where plaintiff having obtained a large number of leases, another party is attempting to secure the same ground by false statement that plaintiff's leases were forfeited. *Allen* v. *New Domain Co.* (Ky.) 73 S. W. 747.

final decision in favor of the appellee in that case, to make some fair and just arrangement with them; that they had discovered a valuable gold vein on the property, and, with the knowledge and consent of appellee, had expended large sums of money in developing the mine which is known as the "Independent Mine," but that now appellee refuses to give them any lease, or make any fair arrangement with them. A general replication was filed, and upon a hearing a temporary injunction granted.

CHARLES D. HAYT, THOMAS MACON, and JOHN R. SMITH, for appellants.

JOEL F. VAILE (EDWARD O. WOLCOTT and ELROY N. CLARK, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The answer challenging the appellee's title, and setting up an adverse superior title, is merely an effort to retry the question settled by the judgment of the supreme court in the case of *Shaw* v. *Kellogg, supra.* It requires no citation of authorities to sustain the proposition of appellee's counsel that a person going upon property by permission of a party while a suit in relation to the title of that property is pending cannot, after that suit has been determined in favor of his licensor, litigate the title over again on the same lines. The only question raised by appellants which it is necessary to notice on this appeal is that appellee has a complete and adequate remedy at law, and that by this proceeding appellants are deprived of their constitutional right to a trial by jury. This precise question, on facts identical in legal effect with the facts of this case, has been three times decided by this court. In *Preteca* v. *Land Grant Co.,* 4 U. S. App. 326, 1 C. C. A. 607, and 50 Fed. 674, this court held that a court of equity had jurisdiction of a cause in which the averments in the bill were substanti-

ally the same as the averments of the bill in this case. In that case we said:

"A court of equity may take cognizance of a controversy to prevent a multiplicity of suits, although the exercise of such jurisdiction may call for the adjudication upon purely legal rights, and confer purely legal relief; and so a court has jurisdiction to restrain waste and trespass to land where the facts are of such a nature that the law cannot afford adequate relief. 1 Pom. Eq. Jur. §§ 243, 245, 252, 271, 274, and cases there cited. The bill avers that the complainant's title has been finally adjudicated in its favor by a court of competent jurisdiction in suits brought against persons in like situations with the defendants. The averments of the bill make the case one of equitable cognizance. Against irresponsible parties taking mineral out of the land and removing the same, and cutting and removing timber, actions of ejectment would have been wholly inadequate for the protection of the complainant's rights. It may be true that the complainant had a remedy at law, but 'it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' *Boyce* v. *Grundy*, 3 Pet. 215; *Oelricks* v. *Spain*, 15 Wall. 211, 288."

In *Coal Co.* v. *McCaleb*, 32 U. S. App. 330, 15 C. C. A. 270, and 68 Fed. 86, the court below had refused to grant an injunction against trespassers who had entered upon complainant's lands, and were mining and shipping coal, but this court reversed that decree, and held that equity had jurisdiction, and that complainant was entitled to an injunction. Judge Thayer, who delivered the opinion of the court in that case, said:

"It is now well settled by many adjudications, beginning with the case of *Mitchell* v. *Dors*, 6 Ves. 147, that an injunction may be granted to restrain a trespasser from entering into a mine and removing the minerals therefrom. Trespasses of that kind, as well as those which consist in cutting down and removing timber, or in removing buildings or other improvements of a permanent character standing upon lands, are readily enjoined, because, as has sometimes been said, such acts tend to destroy the estate, and to occasion irreparable loss and damage. *Courthope* v. *Mapplesden*,

10 Ves. 290; *Scully* v. *Rose*, 61 Md. 408; *Erhardt* v. *Boaro*, 113 U. S. 537, 5 Sup. Ct. 565; *Jerome* v. *Ross*, 7 Johns. Ch. 315; *Hammond* v. *Winchester*, 82 Ala. 470; 2 So. 892; *Snyder* v. *Hopkins*, 31 Kan. 557, 3 Pac. 367; *Iron Co.* v. *Reymert*, 45 N. Y. 703; 2 Beach, Inj. (1895) § 1155; High, Inj. (1st Ed.) § 469."

In *Emigration Co.* v. *Gallegos*, 61 U. S. App. 13, 32 C. C. A. 470, and 89 Fed. 769, this court held that a continuing trespass by a large number of persons, and constant and wrongful diversion of water through lands which is continually depreciating their value, will give a court of equity jurisdiction, even without showing the insolvency of the defendants. In that case Judge Sanborn, speaking for the court, said:

"A continuing trespass upon real estate, or upon an interest therein, to the serious damage of the complainant, warrants an injunction to restrain it. A suit in equity is generally the only adequate remedy for trespasses continually repeated, because constantly recurring actions for damages would be more vexatious and expensive than effective. 2 Beach, Inj. §§ 1129, 1146; *Tallman* v. *Railroad Co.* 121 N. Y. 119, 123, 23 N. E. 1134; *Uline* v. *Railroad Co.* 101 N. Y. 98, 122, 4. N. E. 536; *Galway* v. *Railroad Co.* 128 N. Y. 132, 145, 28 N. E. 479; *Evans* v. *Ross* (Cal.) 8 Pac. 88."

In addition to what has been said, it is now the settled rule of this court and the other circuit courts of appeal which have had occasion to pass upon the subject that on appeals from interlocutory orders granting an injunction whenever the questions of law or facts to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted, and is protected by a good bond, the appellate courts will not disturb the order of the court below. *Newton* v. *Levis*, 49 U. S. App. 266, 25 C. C. A. 161, 79 Fed. 715; *Allison* v. *Corson*, 60 U. S. App. 387, 32 C. C. A. 12, 88 Fed. 581; *Dooley* v. *Hadden*, 38 U. S.

App. 651, 20 C. C. A. 494, 74 Fed. 429; *Jensen* v. *Norton*, 29 U. S. App. 121, 12 C. C. A. 608, 64 Fed. 662.

Other questions have been presented by counsel in their argument, but, as this appeal is merely from an interlocutory order, they should not be determined until the proofs are all in. Upon the showing made by the appellee he was entitled to the injunction, and the order granting it is affirmed.

[1]SILVER CITY GOLD & SILVER MINING CO. v. MARK K. LOWRY ET AL.

(19 Utah 334; 57 Pac. 11. Supreme Court. April 28, 1899.)

[2]**New discovery after hostile patent over the old shaft.** The Wheeler lode was the older claim, but it allowed the Evening Star to go to patent without adverse. The evening Star survey took in the Wheeler discovery, but its owners sunk a new discovery on their clear ground. *Held* that the Wheeler location remained valid as to all the ground outside the Evening Star lines.

[3]**Lessees attempting to relocate.** Lessees of mining ground in possession who oust their lessor by relocating the ground, and setting up an adverse title in themselves, forfeit all rights under the lease.

Restoration of possession. A court having obtained jurisdiction of all parties to an adverse suit for possession of a mining claim may grant full relief and restore possession to the party entitled thereto.

Appeal from District Court, Fifth District; E. V. Higgins, Judge.

[1]Affirmed 179 U. S. 196; 21 M. R. —.

[2]*Gwillim* v. *Donnellan*, 15 M. R. 482. *Richard* v. *Wolfling*, 98 Cal. 195; 32 Pac. 971.

[3]*Murphy* v. *Cobb*, 5 M. R. 330. *Justice Co.* v. *Barclay*, 19 M. R. 68.

Certificate of Relocation containing new names is an original location as to those names and a supplemental certificate as to the original owners. *Tonopah Co.* v. *Tonopah Co.* 125 Fed. 390.

Such certificate is good for all purposes whether mentioned or not. *Id.*

No new discovery is required on which to base a relocation. *Id.*

It is not essential that the certificate shall state on its face that the intention is to take in abandoned property. *Carlin* v. *Freeman*, —Colo. App. —; 75 Pac. 26.

A relocation certificate is not valid as against the original locator who re-entered while the defects intended to be cured by the relocation certificate were in existence. *Field* v. *Tanner*, — Colo. —; 75 Pac. 916.

To relocate so as to take in additional ground it is not required to make a new discovery shaft, or sink the old one ten feet deeper. *Becker* v. *Pugh*, 17 Colo. 246.

Action by Silver City Gold & Silver Mining Company against Mark K. Lowry and others. Judgment for plaintiff. Defendants appeal. Affirmed.

BROWN & HENDERSON and POWERS, STRAUP & LIPPMAN, for appellants.

VARIAN & VARIAN and WILLIAMS, VAN COTT & SUTHERLAND, for respondent.

BASKIN, J. The defendants having, on the 14th day of January, 1898, made application in the land office at Salt Lake City for a patent of the Little Clarissa mining claim, the plaintiff, within the 60-days period of the publication of the notice of said application, filed a protest and adverse claim, based upon the alleged ownership of the Wheeler mining claim, and within 30 days thereafter instituted this suit to determine the ownership and right to the possession of the premises in dispute. The prayer of the complaint was that the plaintiff be declared to be the owner and entitled to the possession of the disputed premises; that its title to the same be quieted; that the plaintiff be put in possession thereof; and that the Little Clarissa mining claim, so far as it conflicts with the Wheeler mining claim, be declared fraudulent and void. At the hearing a decree was entered in conformity with the prayer of the complaint.

The Wheeler mining claim was located January 1, 1889. On the 8th day of February, 1897, the plaintiff leased said claim to the defendants Lowry and De Witt for a period of 18 months. The lease of said claim, among other covenants, contained the following: "That the lessees should sink the main shaft a depth of six feet each month during the life of the lease [this shaft is at the point designated hereinafter as the "new discovery"]; that said lessees should not allow or permit any miners' or other liens to be filed against said min-

ing claim, nor suffer to be done any act or thing whatsoever whereby, or by means whereof, the title to said mining claim should be in any manner or way incumbered; and that upon a failure to comply with any or all of the covenants of the lease the lessees should forfeit their rights under the same."

On the 5th day of June, 1897, the owners of the Evening Star claim made application for a patent for the same, and, after taking the necessary steps required by the mining law, the same was entered in the land office. No protest was made to said application for a patent to the said Evening Star claim.

The original discovery point of the Wheeler claim lies within the exterior boundaries of the Evening Star claim as entered, and 2¼ feet from the southwest side line of said claim. On the day of the expiration of the 60-days publication of the notice of application for said patent, to wit, on the 14th day of August, 1897, the said lessees and their co-defendants, who were at the time engaged in working the Wheeler mining claim as servants of said lessees, with full knowledge of said lease, and that said lessees were in possession under the same, located the Little Clarissa mining claim, which embraces the wheeler claim, its new discovery point, and all of its workings and improvements.

At the trial the defendants took 52 exceptions on which errors are assigned, but, as only a few of the alleged grounds of error have been referred to by counsel in the arguments, we will not notice any except such as are discussed in the briefs.

Appellants' counsel make this statement in their brief: "It would seem that the Evening Star was a later location than the Wheeler, which was therefore a valid and subsisting claim at the date of the lease, and would have remained a valid and subsisting claim, and this controversy never arisen, if the owners of the Wheeler had prevented the owners of the Evening Star from obtaining a patent. That proceeding

was in the nature of a judgment rendered in favor of the Evening Star and against the Wheeler, declaring the Wheeler location null and void."

There is no contention regarding the first sentence quoted, but there is as regards the second. In fact, it is the turning point of the case, and, if resolved against the appellants, it follows that the judgment must be affirmed, provided the ouster of the plaintiff by the defendants, found by the court, warrants the restoration of possession to plaintiff.

The appellants' position, stated in detail, is that the plaintiff, by failing to protest the application for a patent of the Evening Star, which included within its exterior boundaries, as officially surveyed, the original discovery point of the Wheeler claim, lost all of its rights under the prior and valid location of the Wheeler claim, not only to the portion of said claim included by the Evening Star claim, but also to the portion lying outside of the same, and that such outside portion became subject to location as a part of the unoccupied public lands of the United States, notwithstanding, as shown by the evidence and found by the court, long previous to said application for a patent a new discovery of ore had been made on the Wheeler lode outside of the Evening Star claim. The following findings on this point are fully supported by the evidence, to wit:

"That the discovery made upon said mining claim [the Wheeler], as hereinbefore mentioned, was at a point designated upon the plot marked 'Exhibit G,' and hereunto annexed, and made a part of these findings, as 'Old Discovery Shaft,' upon said plot, appearing to be within the boundary lines of the surface of the claim designated as the 'Evening Star' (survey 3,382); but in fact at the time of said discovery, and until about the 5th day of August, A. D. 1898, as hereinbefore mentioned, the same was without the surface boundaries of said Evening Star survey, and within the boundaries of the said Wheeler claim. * * * That on

or about the month of October, 1891, the predecessors in interest of plaintiff corporation made, claimed, and appropriated a new discovery for said Wheeler lode and claim at a point designated on plot G as 'Shaft House, New Discovery,' upon the same vein or lode originally discovered as hereinbefore mentioned; and thereafter the said mining claim was worked and developed through a shaft sunk at said point, and all the work thereon done or performed by the plaintiff corporation or its predecessors in interest was done and performed on said vein at said point, and through said shaft. That the said vein, containing mineral and pay ore, could be readily traced upon the surface for the most of the way from the point marked 'New Discovery' to and into the Evening Star ground at the point marked 'Old Discovery'; and at the time of making the said new discovery, as hereinbefore mentioned, mineral and rock in place, bearing gold and other metals, was found and existed at said point marked 'New Discovery,' and within the surface boundaries of said claim as theretofore staked and marked upon the ground."

The new discovery mentioned in said findings is situated within the exterior boundaries of the Wheeler claim as originally located and marked by monuments and stakes upon the ground, and a considerable distance outside of the Evening Star claim as surveyed for patent.

Appellants' counsel cite the following cases in support of their position: *Gwillim* v. *Donnellan,* 115 U. S. 45, 5 Sup. Ct. 1110; *Miller* v. *Girard,* 3 Colo. App. 278, 33 Pac. 69; *Girard* v. *Carson,* 22 Colo. 345, 44 Pac. 508.

In the case of *Gwillim* v. *Donnellan, supra,* the facts were different from the facts in the case at bar. Chief Justice Waite, in the opinion sustaining the instruction objected to in that case, stated the facts as follows:

"The plaintiff, in presenting his case to the jury, stated, in effect, that after the location of the claim by Thomas, and

before his conveyance to the plaintiff, one Fallon instituted proceedings to obtain a patent from the United States for another claim, including that part of Thomas' claim wherein was situated the discovery shaft sunk by him; but no adverse claim was interposed, and Fallon accordingly entered his claim and obtained a patent therefor; and, before any new workings or developments done or made by Thomas upon any part of his claim not included in the patent, the defendants entered therein, and located the same as a mining claim in the public domain. Upon this statement the court ruled that, 'inasmuch as that part of the claim of said Thomas wherein was situated his discovery shaft had been patented to a third person, the plaintiff was not entitled to recover any part of the premises, and instructed the jury to find for the defendants.' This instruction is assigned as error. Thomas made his location as the discoverer of a vein or lode within the lines of his claim. He made but one location, and that for fifteen hundred feet along the discovered vein. All his labor was done at the discovery shaft. There was no claim of a second discovery at any other place than where the shaft was sunk."

In the case of *Miller* v. *Girard, supra,* the facts were similar to the case decided by Chief Justice Waite. In the opinion the court said:

"It was not established that the owners of the Long John had sunk any other discovery shaft within the limits of their claim prior to the location of the Aurora and Elgin, which would amount to a compliance with the state and federal statutes in this particular. There was enough proof in the case in respect of these matters to entitle the appellants to a finding by the jury on this subject under an instruction which should aptly state the law respecting it. Ever since the decision of the case of *Gwillim* v. *Donnellan,* 115 U. S. 45, it has been the conceded and established law that, if a locator permits an adjoining claimant to obtain a patent from the government for that portion of his territory which in-

cludes his discovery shaft, and he is without another, which gives him a superior right as against the contesting claimant, he must be adjudged to have lost title to whatever territory is embraced within the limits of his claim."

In the case of *Girard* v. *Carson, supra,* the same rule is announced, and the case of *Gwillim* v. *Donnellan, supra,* is cited in support of the same.

Counsel, in their brief, attach much importance to the case of *Girard* v. *Carson,* but this case does not differ from the other cases, except that it is not stated that no other discovery of mineral had been made on the defeated claim outside of the patented claim, previous to the issuance of the patent and the location of the junior claim. Neither does it appear that any such discovery was made.

In a line with these decisions the land department holds that "patent will not issue on an application that expressly excludes therefrom the land upon which is situated the discovery shaft and improvements, and where the proof fails to show the discovery of mineral on the claimed ground." *Lone Dane Lode,* 10 Land Dec. 53; *Cayuga Lode,* 5 Land Dec. 703; *In re Kennedy,* 10 Copp's landowner, 150.

Where the original discovery point embraces all of the lode or vein actually discovered, and the apex of which is not known to exist elsewhere, such a result necessarily follows, because, under the provisions of Section 2322 of the Revised Statutes of the United States, a locator of a mining claim is only entitled to the exclusive right to the possession and enjoyment of such portions of the lodes or veins the top or apex of which lie within the exterior boundaries of the claim; and where the locator allows another to patent the discovery point, which includes all of the known apex of the only vein discovered, or, by conveyance or otherwise, parts with his title an entry cannot be made of the residue of the claim, because proof cannot be made that any vein or lode having its apex within the ground sought to be entered exists, or has

been discovered, and, in the absence of such proof, there is no basis for any claim, either to surface ground or a lode, vein, or deposit of mineral, under the mining law.

In the case at bar the evidence shows: That at the point of the original discovery of the Wheeler claim the only development made was an excavation about 9.5 feet deep 2.4 feet within the southwest side line of the Evening Star, as surveyed for patent. From said point the vein was traceable on the surface 500 feet. That the vein was on the surface all the way from said point to the new discovery shaft, and could be traced upon the surface, and at places between these points was stripped and opened. That at the new discovery point there had been sunk, previous to February, 1892, a shaft, on the main vein, 100 feet deep, and at that date a contract was let to one Johnson, by the owners of the Wheeler mine, to sink said shaft 100 feet deeper, which he performed, and in doing so extracted some ore. That the improvements on the Wheeler claim, consisting of a shaft house, a blacksmith shop, and a whim house, were situated at or near said shaft; and said shaft and improvements were situated on the Wheeler claim, outside of the Evening Star claim, and about 500 feet from the point of the original discovery, in a northeasterly direction therefrom.

As these facts clearly show the existence and development of a vein or lode of mineral, the apex of which is within the exterior boundaries of the Wheeler claim outside of the Evening Star claim, and that the existence of such vein or lode was ascertained and developed previous to the application for a patent by the Evening Star claim and the inception of the Little Clarissa under a location which appellants admit was valid up to the expiration of the 60-days period of publication of the notice of such application, the case at bar is not within the reason of the rule announced in the case of *Gwillim* v. *Donnellan, supra.*

The land department holds that, where a portion of a claim

embracing the original discovery is lost, or is waived or omitted from the application, a patent will be issued for the balance, provided that the vein has been discovered and developed in the portion of the claim not omitted. Secretary Teller to Commissioner, 1 Land Dec. 593.

The commissioner of the land office having asked the secretary this question: "Did the waiver of the discovery shaft and the portion of the lode within the Kangaroo survey by failure to file an adverse claim have the effect to vitiate the entire Metropolitan location, and bar an application for any part of the same?" The secretary, in answer, said: "On the first point I am of the opinion that the development and possession of the lode, so far as it runs upon public land, was not interfered with in any manner by the waiver of a portion, even though the original discovery shaft was included in the portion disposed of. The continued possession and working of such outside portion under the original ownership and location ought not to be held as forfeited while the good faith of the owner towards the United States is not impaired; and opportunity should not be given to a stranger to appropriate under United States laws the property and improvements which he has acquired and made upon a good and sufficient location properly asserted at the time of the original discovery.

"Section 2326 of the Revised Statutes recognizes portions of claims as entitled to patent, and the issue of separate patents on such portions as adverse parties may rightfully possess. Assignment of any interest whatever in these mining possessions has been declared valid by the supreme court, even by a parol transfer without a written instrument.

"If the existence of the lode be shown beyond the lines of the conflicting survey, and application be made for patent, it would seem to work a complete abrogation of a property and statutory right to deny a patent thereon because of a sale or surrender of some other portion of the lode originally em-

braced in the discovery and location." See, also, *Spur Lode*, 4 Land Dec. 160; *Cayuga Lode*, 5 Land Dec. 703.

The views of Secretary Teller are supported by an opinion of Judge Hallett in the case of *Little Pittsburgh M. Co.* v. *Amie M. Co.*, 17 Fed. 57. In that opinion it is said:

"This position appears to be to the effect that one who owns a mining claim must, at all events, hold on to his discovery shaft until he has obtained a patent for his claim. If he yields it to another in any way, by conveyance or otherwise, he thereby abandons his claim. I do not see upon what principle such a conclusion can rest. After a claim has been properly located, the owner of it may sell any part without prejudice to his right to hold the remainder. He may dispose of it by gift or grant in any way which seems proper to him."

If a mining claim—as, in practice, most of them are—is held by tenants in common, under the laws of most, if not all, of the mining states, they may petition for partition. If upon partition of a claim a portion should be set off to one of the parties, on which the original discovery was not located, under the rule insisted upon by appellants, he would lose all of his rights, notwithstanding the lode might exist, and have been developed and worked through the whole length of the claim.

The cases upon which the appellants rely do not sustain their contention, because the facts involved in them were radically different from the facts in the case at bar.

Chief Justice Waite indicates, from the language used in the opinion in the case of *Gwillim* v. *Donnellan, supra*, that, if it had appeared that a second discovery had been made at any place on the defeated claim, other than the original discovery which was within the patented ground, the right to the portion of the claim outside of the patent would not have been lost.

The land department having established the rule thus

indicated, we are of the opinion that under the facts disclosed by the evidence and findings, the case at bar is clearly within the rule thus established, and, no decision holding a contrary view having been brought to our notice, it should be followed in this case.

The judgment is objected to by counsel for the appellants, because the appellants were enjoined from working the mine, and possession thereof awarded to the plaintiff before the term of the lease expired.

The defendant lessees forfeited all rights under the lease by the ouster of the plaintiff and setting up an adverse title in themselves and the co-locators of the Little Clarissa claim. Taylor, Landl. & Ten. § 522, and cases there cited.

The court, having obtained jurisdiction to determine the rights of the parties, could grant full relief, and restore the possession to the plaintiff.

Appellants contend that the Wheeler claim had been abandoned by the plaintiff previous to the location of the Little Clarissa claim. On that point the court below properly found for the plaintiff.

The judgment of the court below is affirmed, with costs.

BARTCH, C. J., and MINER, J., concur.

G. V. B. MINING CO. v. FIRST NATIONAL BANK OF HAILEY. ARTHUR BROWN, ET AL. INTERVENERS.

(95 Federal 35. Circuit Court of Appeals, Ninth Circuit. May 2, 1899.)

[1]**Lien of mortgage takes proceeds as against lessee.** One who leases mining property from a corporation with full knowledge of a prior mortgage thereon, which is contested by the corporation, takes subject to all rights of the mortgagee; and, where the validity of the mortgage is sustained, he is not entitled to claim the proceeds of the mines while operated by a receiver appointed in a foreclosure suit, as against the mortgagee on the ground that he expended money to render them productive.

Lien of a partner. Under the rule in *Duryea* v. *Burt* a mining partner "has a specific lien on the partnership property not only for the debts and liabilities due to third persons but also for his own share of the capital stock and funds and for all moneys advanced by him for the use of the concern."

Mine operated by receiver. The law of mining partnerships, as declared by the courts or by the statutes of Idaho, does not entitle a mining partner to a lien on the product of a mine for his share of past profits made by his partners while he was excluded from the property, as against a mortgagee of the interests of such partners, although he will be entitled to his share of the product while the mine is operated by a receiver appointed in a suit to foreclose the mortgage.

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[1]Under trust deed providing for net receipts to go on a loan the workmen have a prior lien. *Charter Oak Ins. Co.* v. *Gisborne*, 5 Utah 319; 15 Pac. 253.

The royalty is to be paid out of the first proceeds of sale of a mortgaged lease. *Childs* v. *Hurd*, 32 W. Va., 67; 9 S. E. 362.

Mortgagee after default may enter and is not bound to account, except to apply the mine proceeds on the debt. *Id.*

A mining tramway passes with a mortgage of the lease. *Id.*

Miners allowed precedence over a mortgage purporting to cover ores to be extracted. *Galloway* v. *Blue Springs Co.* (Tenn.) 37 S. W. 1016.

Suit by mortgagee against lessee of the mortgagor to collect royalties on account of the debt. *Central Tr. Co.* v. *Berwind-White Co.* 95 Fed. 391.

Mortgagor constructs new ditch on line of old one: Damage for waste against mortgagor. *Mitchell* v. *Amador Co.* 75 Cal. 464; 17 Pac. 246.

Appeal from the Circuit Court of the United States for the District of Idaho.

A. F. MONTANDON, for appellants G. V. B. Min. Co. and Henry Aplington.

LYTTLETON PRICE, for appellant First National Bank of Hailey.

ARTHUR BROWN, in pro. per.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. Pending the foreclosure suit of *G. V. B. Min. Co.* v. *First National Bank,* 95 Fed. 23, a receiver was appointed by the court to take charge of the proceeds of ore from the Red Elephant group of mines, then operated by Henry Aplington under a lease from the mining company. The amount of money from the proceeds of the

Promise of mortgagee buying in on foreclosure to give mortgagor excess over debt in case of sale, does not affect the title to the property. *Eaton* v. *Rocca,* 75 Cal. 94; 16 Pac. 529.

Mortgagor agreed to turn over net results of each clean up on account, the mortgagee to pay the expenses: *Held,* no partnership and mortgagee not personally liable for the debts. *Chung Kee* v. *Davidson,* 102 Cal. 188; 36 Pac. 519.

Agreement to deed property in satisfaction of, enforced. *Wolf* v. *Arminus Co.* 27 N. Y. Sup. 642.

A purchaser may assume a mortgage without assuming the notes in support of it. *Blood* v. *Crew Levick Co.* 171 Pa. 328; 33 Atl. 344.

Mortgage purporting to cover all the personal property in connection with operating mines held not to cover the product of the mine. *Alabama Bank* v. *Mary Lee Coal Co.* 108 Ala. 288; 19 So. 404.

Parol contemporaneous agreement to rely first on the secured property, is valid. *Clinch Co.* v. *Willing,* 180 Pa. 165; 36 Atl. 737.

Any holder of one of many bonds secured by the trust deed may sue on his bond separately. *Kimber* v. *Gunnell Co.* 126 Fed. 137.

ore thus extracted that came into the hands of the receiver was $7,617.34. Arthur Brown and Henry Aplington have each separately intervened in the suit of foreclosure, and claim the money realized from the proceeds of the ore thus extracted. Brown claims all of it. The court gave him one-third. He appeals from the order of the court refusing to give him the other two-thirds. Aplington admits that Brown is entitled to one-third, but claims the other two-thirds. The court refused to allow him any part of it. He appeals from this ruling of the court. The bank claims all of it. The court gave it two-thirds. It appeals from the order allowing Brown the one-third. 89 Fed. 449.

Who is entitled to this money? What are the facts?

1. Aplington claims the two-thirds by virtue of the lease which was given him by the G. V. B. Mining Company, the facts in regard to which are sufficiently stated in the statement of facts in the foreclosure suit, and in support of his claim asserts a right thereto on account of the time, labor, and expense by him incurred in working the mines, and producing the money from the ores extracted therefrom, which, he claims, were far in excess of the value of the money derived therefrom. It is clear that, as against the bank, he is not entitled to anything. The bank did not employ him. It had nothing to do with the leasing of the property to him. His rights in the premises depended solely upon the ground that Thurber would, under the name of the mining corporation, be able to defeat the lien of the bank's mortgage. He took his chances, and must abide the consequences which he voluntarily brought upon himself. When he took the lease, he had full knowledge of the bank's mortgage. He knew it was prior in time to any right or claim he had. The mortgage, having been declared valid, constitutes a prior lien upon the property. The bank had the right to have a receiver appointed to take all moneys from the proceeds of ore, and hold the same to abide the result of its foreclosure suit, and,

if successful, it was, as against Aplington, entitled to all the money.

2. The facts upon which Brown claims all the money are substantially as follows: Prior to September 22, 1888, G. V. Bryan, George W. Venable, and George H. Roberts were mining partners working the Red Elephant group of mines. About that time Roberts executed a deed of trust in favor of the First National Bank of Hailey to secure a promissory note in the sum of $1,500. Bryan and Venable thereafter bought the deed of trust from the First National Bank of Hailey, advertised the property for sale, and sold it on the 17th day of August, 1889. It was bought in for the benefit of Bryan and Venable, and they subsequently became the owners of the right purchased under that deed of trust. After August, 1889, Roberts was excluded from the property. Within six months after this sale, under the deed of trust as it is termed, Roberts conveyed and assigned all his rights, interest, equities, and accounts to Brown, who made tender of the amount due to Bryan and Venable, and demanded a conveyance of the one-third interest, and to have the title obtained by them by the foreclosure of the deed of trust set aside. Bryan and Venable refused to recognize Brown or any rights which he had in the property. Brown thereafter commenced suit in the district court of the territory of Idaho to set aside the pretended title in Bryan and Venable to this one-third interest, also claiming that there was a right of redemption, as in the case of any other sale, the tender having been regularly made upon the amount due upon said trust deed. The suit in the district court was decided against him. He then took an appeal to the supreme court, and succeeded in having the judgment of the district court set aside. The court, among other things, held that the one-third interest in the mines should be decreed to belong to the maker of the trust deed (Roberts) or to his assignee, Brown. *Brown* v. *Bryan* (Idaho), 51 Pac. 995, 997. The facts of the conveyance of

the property by Bryan and Venable to the G. V. B. Mining Company, and of the subsequent acts of the parties, are sufficiently stated in the foreclosure suit, to which reference is here made.

In the supplemental transcript it appears, from the testimony of Thurber and Brown, that Bryan and Venable and the G. V. B. Mining Company had, at different times between 1889 and December, 1895, extracted over $500,000, in round figures, worth of ore, and that the actual profits from the same were over $100,000. This ore, it is claimed, had been extracted, and these profits realized therefrom, during the period when Roberts and his assignee, Brown, the intervener, were excluded from participating in the working of the mines. The suit in the state court, wherein Brown prays for an accounting between the parties, has never been brought to trial upon that issue, and the results that might finally be reached upon a regular trial are, under the facts established in the foreclosure suit, problematical, remote, and uncertain. But we shall assume, for the purpose of this opinion, that the intervener Brown has made out a prima facie case that the profits were as above stated.

Upon the state of facts disclosed by the record, we are of opinion that Brown is entitled to one-third of the money, on the ground that he must, in the light of the decision of the supreme court of Idaho, be treated as the owner of one-third interest in the property and proceeds. Is he entitled to the other two-thirds? His contention is that he is entitled to a lien upon the property, and funds obtained therefrom, to secure his share of the profits derived from the working of the mines by Bryan and Venable and the G. V. B. Mining Company, because of his relation as a partner with them in the mines; and that the lien relates back, and took effect at the time Roberts was excluded from participating in the working of the property and sharing in the profits, and has

continued in full force and effect to the present time, and is prior in right and time to the lien of the bank's mortgage.

In support of this contention, he relies upon the provisions of the statute of Idaho, which read as follows:

"Sec. 3300. A mining partnership exists when two or more persons who own or acquire a mining claim, for the purpose of working it and extracting the mineral therefrom, actually engage in working the same."

"Sec. 3301. An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interests in the mine and working the same for the purpose of extracting the minerals therefrom."

"Sec. 3305. One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership. The purchaser, from the date of his purchase, becomes a member of the partnership." Rev. St. Idaho, 1887, p. 385.

The principles in relation to mining partnerships were ably discussed, and clearly stated, in *Duryea* v. *Burt,* 28 Cal. 569, 577, where it was held that, if two or more persons acquire a mining claim for the purpose of working the same and extracting the mineral therefrom, and actually engage in working the same, and share, according to the interest of each, in the profit and loss, the partnership relation subsists between them, although there is no express agreement between them to become partners, or to share the profits and losses; that one of the partners in a mining partnership may convey his interest in the mine without dissolving the partnership; that each member of the mining partnership has a lien upon the partnership property for the debts due the creditors of the partnership, and for moneys advanced by him for its use, which he may enforce in equity, even if there has been no agreement among the partners that such lien shall exist. The *delectus personæ,* incident to an ordinary partnership, has no place in such mining partnerships. This opinion has stood

the test of time, and has everywhere been acknowledged as a leading case concerning mining partnerships, and has always been followed, in the absence of any state statute to the contrary.

In *Kahn* v. *Smelting Co.*, 102 U. S. 641, 645, the court said:

"Mining partnerships, as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities; indeed, without them successful mining would be attended with difficulties and embarrassments much greater than at present. In *Skillman* v. *Lachman*, 23 Cal. 203, the question of the relation existing between parties owning several interests in a mine came before the supreme court of California, and that court said that, 'whatever may be the rights and liabilities of tenants in common of a mine not being worked, it is clear that, where the several owners unite and co-operate in working the mine, then a new relation exists between them, and, to a certain extent, they are governed by the rules relating to partnerships. They form what is termed "a mining partnership," which is governed by many of the rules relating to ordinary partnerships, but also by some rules peculiar to itself, one of which is that one person may convey his interest in the mine and business without dissolving the partnership.' The same doctrine is asserted in numerous other cases, not only in that court, but in the courts of England. Associations for working mines are generally composed of a greater number of persons than ordinary trading partnerships; and it was early seen that the continuous working of a mine, which is essential to its successful development, would be impossible, or at least attended with great difficulties, if an association was to be dissolved by the death or bankruptcy of one of its members or the assignment of his interest. A different rule from that which governs the relations of members of a trading partnership to each other was therefore recognized as applicable to the relations to each other of members of a mining association. The *delectus personae*, which is essential to constitute an ordinary partnership, has no place in these mining associations. *Duryea* v. *Burt*, 28 Cal. 569; *Settembre* v. *Putnam*, 30 Cal. 490; *Taylor* v. *Castle*, 42 Cal. 367."

See, also, *Thomas* v. *Hurst*, 73 Fed. 372, 374; *Bissell* v. *Foss*, 114 U. S. 252, 260, 5 Sup. Ct. 851; *Jones* v. *Clark*,

42 Cal. 180; *Charles* v. *Eshleman,* 5 Colo. 107, 111; *Manville* v. *Parks,* 7 Colo. 128, 133, 2 Pac. 212; *Higgins* v. *Armstrong,* 9 Colo. 38, 46, 10 Pac. 232; *Meagher* v. *Reed,* 14 Colo. 335, 354, 24 Pac. 681; *Patrick* v. *Weston,* 22 Colo. 45, 49, 43 Pac. 446; *Nolan* v. *Lovelock,* 1 Mont. 224; *Anaconda Copper M. Co.* v. *Butte M. Co.,* 17 Mont. 519, 523, 43 Pac. 924; *Kahn* v. *Mining Co.,* 2 Utah, 174, 218; *Lamar* v. *Hale,* 79 Va. 147, 160; 2 Lindl. Mines, § 796 et seq.

In the cases cited the court was dealing with a partnership that was actually engaged, as such, in the working of the mining claim owned by them; and in such cases it is held that a partner who advances money to the partnership would have a lien therefor by virtue of his known relation, and, if he advances any money to the creditors of the partnership, he would have a lien on the property therefor. This lien does not necessarily spring from any agreement between the partners, but is created by operation of law upon the partnership relation. Under the rule announced in *Duryea* v. *Burt,* any partner in such a mining partnership "has a specific lien on the partnership property not only for the debts and liabilities due to third persons, but also for his own share of the capital stock and funds, and for all moneys advanced by him for the use of the concern." If Brown, as a partner, had paid a debt due to a creditor of the partnership, he would, of course, be entitled to a lien on the property or other funds of the partnership—or, if he had advanced any money, for the use of the partnership, he would also have his lien on the entire fund. But he did neither. The result is that he is only entitled to a lien for "his own share of the capital stock and funds," which is one-third. This was given to him by the court. He claims that his rights must be decided by the provisions of the statute of Idaho. Admit it. We find the statute of that state identical in principle, and almost verbatim in language, with the rule announced in *Duryea* v. *Burt,* and similar to the statutes of California, Montana, and

other Western states. If any distinction exists, it is against, instead of in favor of, the interveners' contention.

In addition to the sections heretofore cited, we quote Sections 3302 and 3303, which read as follows:

"Sec. 3302. A member of a mining partnership shares in the profits and losses thereof in the proportion which the interest or share he owns in the mine bears to the whole partnership capital or whole number of shares.

"Sec. 3303. Each member of a mining partnership has a lien on the partnership property for the debts due the creditors thereof, and for money advanced by him for its use. A lien exists in favor of the creditors notwithstanding there is an agreement among the partners that it must not."

These provisions clearly support the views above expressed. The lien given to the partner upon the property or funds is not for the profits due him, but for the "debts due the creditors" and "for money advanced by him for its use."

That Brown would be entitled to an accounting, as against Bryan and Venable and the G. V. B. Mining Company, is conceded. But there is a distinction between the right to an accounting and his right to a lien as against creditors. He would be entitled to an accounting as a co-owner with the others in the mine, independent of the question as to whether a partnership existed or not. In *Kahn* v. *Smelting Co., supra,* which follows the rule announced in *Duryea* v. *Burt,* this principle is clearly recognized. The court in that case said: "But, if the relation of the plaintiff to his associates could not be considered as one of a mining partnership, he was still entitled to an accounting from them, if, as alleged by him, he was joint owner with them in the mine." See, also, *Hawkins* v. *Mining Co.,* 2 Idaho, 970, 28 Pac. 433.

Our conclusion is that Brown, upon the allegations in his petition for intervention and the oral testimony introduced in support thereof, whatever his rights may be, upon an accounting, as against the G. V. B. Mining Company, or Bryan

and Venable, whether he be treated as a partner or co-owner with them in the property, or in the profits, if any, which they may have received from their working of the mines during the time of his exclusion from his one-third interest therein, is not entitled to any lien as against the mortgage lien of the bank upon the two-thirds interest in the property and like interest in the money in the hands of the receiver. The bank, upon the decision of the supreme court of Idaho in *Brown* v. *Bryan*, relinquished its mortgage as against his one-third interest in the mines. The orders of the court as to the disposition of the money in the hands of the receiver are affirmed, with costs.

ST. MARY'S GAS CO. v. THE COUNTY OF ELK ET AL.

(191 Pennsylvania 458. 43 Atl. 321. Supreme Court. May 15, 1899.)

Natural gas companies are public corporations having the right of eminent domain.

Eminent domain a judicial question. Whenever the extent of the right of eminent domain is not specifically defined and limited by the law, the question as to the necessary and proper exercise of the right by the corporation invested therewith, is one which must ultimately be determined by the courts, and not by the corporation itself.

No local taxation. A natural gas company organized under the act of May 29, 1885, is a corporation engaged in a business of a public interest and cannot be taxed upon the land by the local authorities where it appears that the gas in the land is necessary and indispensable to the company in carrying out the public purpose for which it was incorporated, and is part of its capital stock on which it pays a tax to the state.

Injunction is the proper remedy against a tax on property not subject thereto.

Appeal from Court of Common Pleas, Elk County.

Suit by St. Mary's Gas Company against the County of

The right to take natural gas is not "land held in fee." *Greensburg Co.* v. *Irwin Co.* 162 Pa. 78; 29 Atl. 274.

License to prospect held taxable. *State* v. *South Penn. Co.* 42 W. Va. 80; 24 S. E. 688.

Prospective production cannot be assessed. Oil until brought to surface is realty. *Carter* v. *Tyler County*, 45 W. Va. 806; 32 S. E. 216.

Coal mined in one State and sent to another and there landed becomes liable to tax. *Brown* v. *Houston*, 114 U. S. 623.

Where a patented placer has been laid out into town lots it ceases to be exempt from tax as a mining claim. *Dyke* v. *White*, 17 Colo. 298.

Consideration of the division of mines into two classes, producing and non-producing, for tax purposes. *Pilgrim Co.* v. *Teller County*, — Colo. —; 76 Pac. 364.

For other citations on tax questions see notes to *Eureka Hill Co.* v. *Eureka*, 21 M. R.—.

Elk and others. Decree for plaintiff. Defendants appeal. Affirmed.

The following is the opinion of the court below (C. A. MAYER, P. J.):

When this case was before the court on hearing for preliminary injunction from the evidence adduced before us, we awarded an injunction to restrain the treasurer of Elk county from selling the lands of the plaintiff. The case was removed to the supreme court, by appeal, on the part of the defendants, and the decree granting the preliminary injunction was affirmed, and the appeal dismissed. 31 Atl. 1077. The case came on for final hearing, and the testimony of only one witness was taken to contradict the testimony of the plaintiff's witnesses that the real estate owned by the plaintiff was necessary and indispensable to the company in carrying out the purposes for which it was incorporated. The testimony of this witness was contradicted by the testimony of a witness, called on the part of the plaintiff, who had considerable experience in the business of natural gas companies; so that the case, as presented upon final hearing, does not in any way differ from the case when presented for hearing on the preliminary injunction. We therefore adopt the opinion rendered on the preliminary injunction as the opinion of this court for a final decree, as follows:

The plaintiff, the St. Mary's Gas Company, has filed its bill against the County of Elk and the treasurer of said county, averring that it is a corporation duly organized and chartered under the act of assembly of May 29, 1885 (P. L. 29), for the purpose of producing, dealing in, transporting, storing, and supplying natural gas for public consumption, and as such is taxed upon its capital stock under the provisions of the 21st section of the act of assembly of June 1, 1889 (P. L. 429), and supplements thereto.

The St. Mary's Gas Company is the owner of the natural gas in 684 acres of land situate in Ridgeway township, Elk county, which is held and used only by the said St. Mary's Gas Company for its corporate purposes, and is wholly included in its capital stock.

The said St. Mary's Gas Company is a public corporation having the right of eminent domain, and the natural gas in above lands is necessary and indispensable to the exercise of its corporate rights as a public corporation for the purpose of producing, dealing in, transporting, storing, and supplying natural gas for public consumption.

The County of Elk has assessed taxes for local purposes upon the said lands for the years 1890, 1891, 1892, and 1893, aggregating the sum of $1,024.50, which the said St. Mary's Gas Company has refused to pay.

The said T. J. Shaffer, treasurer of Elk county, has advertised, under the provisions of the act of assembly approved March 13, 1815, (P. L. 177), the sale of said property, at the court house in Ridgeway, on the 11th day of June, A. D. 1894, for the nonpayment of taxes above stated.

It is advised and believes, and therefore avers, that their said property is not liable to taxation by the said County of Elk for local purposes as aforesaid, and that said assessment for taxes is illegal and void:

And praying that the aforesaid assessment of taxes by the County of Elk be decreed to be void and of no effect; that an injunction may issue, temporary until hearing and perpetual thereafter, restraining the said County of Elk from the assessment and collection of taxes upon the said property, and further restraining the said T. J. Shaffer, treasurer of said county, from selling the said property for non-payment of taxes as aforesaid.

The defendant has made answer to said bill, which, on this hearing, is to be regarded as an affidavit, admitting the incorporation of said plaintiff, under the act of May 29,

1885, but denying that it is a public corporation, and averring that the oil and gas in the 684 acres owned by the said corporation are liable to taxation.

The St. Mary's Gas Company is a corporation duly chartered and organized under "An act to provide for the incorporation and regulation of natural gas companies," approved May 29, 1885, and is invested with all the rights, powers, and privileges specified in the act. It is authorized by the first section "to produce, mine, own, deal in, transport, store and supply natural gas for either light or heat or both or other purposes, and having all the rights and privileges necessary or convenient therefor." Section 10 of the act provides that: "The transportation and supply of natural gas for the public consumption is hereby declared to be a public use, and it shall be the duty of corporations, organized or provided for under this act to furnish to customers along their lines and within their respective districts natural gas for heat or light or other purposes as the corporation may determine," and provides, further: "Any and all corporations that is or are now or shall hereafter be engaged in such business, shall have the right of eminent domain for the laying of pipe lines for the transportation and distribution of natural gas, the right, however, shall not be exercised as to any burying ground or dwelling, passenger railroad, station house or any shop or manufactory in which steam or fire is necessarily used for manufacturing or repairing purposes, but shall include the right to appropriate land upon or under which to lay said lines and locate pipes upon and over, under and across any lands, rivers, streams, bridges, roads, streets, lanes, alleys or other public highways, or other pipe lines or to cross railroads or canals; provided, in case the pipe lines cross any railroad operated by steam or canal, the same shall be located under or above such railroad or canal, and in such manner as the railroad or canal company may reasonably direct, and provided further, that any company laying a pipe line under the

provisions thereof shall be liable for all damages occasioned by reason of the negligence of such gas company," etc.

It is clear from the consideration of the foregoing and other provisions of the act that companies organized under it are public corporations. In addition to the legislative declaration that the transportation and supply of natural gas for the public consumption is "a public use," corporations organized or provided for under the act are required "to furnish consumers along their lines and within their respective districts natural gas for heat or light or other purposes, as the corporation may determine." They are also invested in the fullest manner with the right of eminent domain and all other powers and privileges necessary for the prosecution of the business for which they are incorporated.

"Where use has been declared to be public by the legislature, the courts will hold it such, unless the contrary clearly appears." *Edgewood R. Co., Appeal,* 79 Pa. St. 257; *Bankhead* v. *Brown,* 25 Iowa, 540; *Concord Railroad Co.* v. *Greely,* 17 N. H. 47; *Olmstead* v. *Camp,* 33 Conn. 532.

But this question has been decided by the supreme court in the case of *Johnson* v. *Gas Co.* (Pa.), reported in 5 Cent. Rep. p. 564 (s. c. 7 Atl. 167), in which it was held "that the transportation and supplying of natural gas for public consumption is a public use, and the right of eminent domain granted to corporations by the tenth section of the act to provide for incorporation and regulation of natural gas companies of May 29, 1885, is within the constitutional power of the legislature to grant."

It may be proper to state here that no evidence has been adduced by the defendant to show that oil exists in said land, or that it is oil territory. On the contrary, the evidence of the plaintiff proves that it is not oil territory, and that oil has not been discovered upon it, although a number of wells have been drilled. The evidence of the plaintiff shows, and there is no countervailing proof, that the gas in the 684 acres is

necessary and indispensable to it in carrying out the public purposes for which it was incorporated, and is part of its capital stock upon which it pays a tax to the state.

Being of the opinion that the plaintiff is a corporation engaged in a business of the public interest, and that as the evidence shows the gas in the 684 acres is essential to the exercise of its corporate franchises for public purposes, the exemption from taxation claimed must be sustained.

"The principle which appears to be recognized in all the cases is that the public works of a corporation, used as such, with their necessary appurtenances, and which are essential to the carrying out of the public purposes of such corporation, are exempt from taxation." *West Chester Gas Co.* v. *Chester County,* 30 Pa. 232; *Coatesville Gas Co.* v. *Chester County,* 97 Pa. 476. In *Scranton* v. *Scranton Electric Light & Power Co.,* it was decided that the property necessary to carry out the corporate purposes of a corporation engaged in business of public interest is not liable to local taxation, where such property is included in the capital stock, which pays a state tax, 8 Pa. Co. Ct. R. 626. To the same effect is *Lancaster* v. *Edison Electric Illuminating Co.,* Id. 631. "A public corporation is one which cannot carry out the purposes of its organization without charter rights from the commonwealth. Railroads, canals, and gas companies must have the right of eminent domain in order to perform their functions. Their property, which is indispensable to their charter rights, is represented by their capital stock, and, as such, is taxed specially by the legislature, and the law will not subject it to duplicate taxation by mere inference. *Schuylkill Co.* v. *Citizens' Gas Co.,* 148 Pa. St. 162, 23 Atl. 1055.

But it is contended by defendant that, if the assessment of taxes was illegal, a bill for injunction is not the proper remedy; that plaintiff should have proceeded in the manner provided by the act of assembly, and appealed from the assess-

ment. This contention is untenable. In the case of *Banger's Appeal,* 109 Pa. 91, the supreme court said: "It was urged that a court of equity will not interfere to restrain the collection of taxes, but will leave the party aggrieved to his remedy at law. This is true where tax is lawfully assessed, or where the matters complained of are mere irregularities in the valuation or assessment; but where there is want of power to tax or disregard of the constitution in the mode of assessment, we have no doubt of the power and duty of a court of equity to interfere." *St. Clair School Board's Appeal,* 74 Pa. 256; *Wheeler* v. *Philadelphia,* 77 Pa. 338; *Kitty Roup's Case,* 81* Pa. 211. In *Moore* v. *Taylor,* 147 Pa. 481, 23 Atl. 768, the property had been exempt for a part of a year, but the exemption ceased, and it was then assessed. It was properly held that, as the property was liable to taxation, the remedy of the party aggrieved was by appeal and that a bill in equity would not lie. A perpetual injunction is awarded.

W. S. HAMBLEN, for appellants.

HARRY ALVAN HALL, for appellee.

PER CURIAM. The controlling facts of this case sufficiently appear in the pleadings, in connection with the opinion of the court below, and hence it is unnecessary to recite or summarize them here. A careful consideration of the record has not convinced us that there is any error in the decree, or in the proceedings leading up thereto, that requires either reversal or modification. On the contrary, we are all satisfied that the decree is based upon correctly ascertained facts and sound principles of law. All the questions involved, both of fact and law, have been so fully considered and correctly determined that further discussion of them by us is deemed unnecessary.

As to one of the most important questions of fact in the case, the learned trial judge found, upon sufficient evidence, "that the gas in the 684 acres is necessary and indispensable to it [the plaintiff company] in carrying out the public purpose for which it was incorporated, and is part of its capital stock, on which it pays a tax to the state." This finding brings the case within the principle that, whenever the extent of the right of eminent domain is not specifically defined and limited by the law, the question as to the necessary and proper exercise of that right, by the corporation invested therewith, is one which must ultimately be determined by the courts, and not by the corporation itself.

Without further comment, the decree of the court below is affirmed on the opinion of its learned president and the appeal is dismissed at appellant's costs.

DURANT v. CORBIN.

(94 Federal 382. Circuit Court, District of Washington, E. D. May 22, 1899.)

[1]**The use of the names of nominal associates so as to take up 160 instead of 20 acres of placer ground is not permissible and such location is valid only to the extent of the 20 acres of the real party.**

[2]**There must be proof that the land is valuable as mineral land where it has been located on the grounds of an Indian reservation recently thrown open to mineral entries only. There being no such proof there must be judgment in an adverse claim suit that neither party is entitled to the land.**

This was a suit in equity to adjudicate conflicting rights in mining claims on the public lands.

HEYBURN, PRICE, HEYBURN & DOHERTY, for complainant.

ALBERT ALLEN, for defendant.

HANFORD, District Judge. This is a suit in equity, brought

[1]Three persons operating in the interest of one are limited to a single 20 acres. *Gird* v. *California Oil Co.* 18 M. R. 45.

Courts will not enforce an equity founded upon the use of nominal parties to locate and patent placer ground in excess of the 20 acres allowed to each real person in interest. *Mitchell* v. *Cline*, 84 Cal. 409; 24 Pac. 164.

A location of 160 acres by eight persons is but a single claim. *Miller* v. *Chrisman*, 140 Cal. 440; 73 Pac. 1083.

[2]*Bay* v. *Oklahoma Co.* 13 Okl. 425; 73 Pac. 936.

To what extent when on surveyed land they are required to conform to the government lines. *Mitchell* v. *Hutchinson*, 142 Cal. 404; 76 Pac. 55.

A placer location upon a legal subdivision must be staked the same as if upon unsurveyed ground. *Worthen* v. *Sidway*, Ark. ; 79 S. W. 777. Contra, *Kern Co.* v. *Crawford*, — Cal. —; 76 Pac. 1111.

Prospector cannot enter on located placer ground to search for lodes. *Clipper Co.* v. *Eli Co.* 194 U. S. 220.

under Section 2326, Rev. St. U. S., in support of the complainant's adverse claim, filed in the United States land office at Spokane, against the application of the defendant for a patent for Sheep Creek placer claim. The complainant claims, by purchase from the locators thereof, the Lost Axe and Clifford mining claims, each containing 20 acres, which are within the boundaries of Sheep Creek placer claim, containing 160 acres, located by a company of eight persons, seven of whom have executed deeds conveying their rights to the defendant. In their pleadings each party claims priority in point of time in the making of their respective locations, both being made on the same date, to-wit: February 20, 1896. There is, however, such preponderance of the evidence in favor of the defendant on this point that counsel for the complainant upon the hearing pactically conceded that the location of the Sheep Creek placer claim was prior in point of time to the locations of the Lost Axe and Clifford. The complainant, however, contests the validity of the Sheep Creek location on the ground that the same was not made bona fide by all of the eight persons named, and charges that all of them except R. A. Hutchinson, who has not given a deed of his interest to the defendant, were either employees of the defendant, and acting for him in locating said claim, or they were friends of the defendant, who had nothing whatever to do with making said locations, and that the defendant simply used their names as locators, in the expectation that they would afterwards convey whatever colorable rights might be acquired in their names to him without consideration. The evidence fully sustains the contention of the complainant that the location of Sheep Creek placer claim was merely a scheme on the part of the defendant to acquire title to the ground by using the names of his employes and friends as locators. I have no difficulty in finding this to be the case from the testimony of the defendant himself, who frankly admits that he arranged for and directed the location

of said claim, and that his purpose was to be sure of having the ground located in the names of his friends, with whom he could deal on terms satisfactory to himself; and he also admits that he has paid no consideration for the conveyances which the locators have made to him. The evidence shows, however, that he did pay some of the locators who went upon the ground for doing so. The defendant claims that the location of the Sheep Creek placer claim in the manner in which it was made is authorized by Section 2330, Rev. St. U. S., which reads as follows:

"Sec. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer-claim made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide pre-emption or homestead claim upon agricultural lands or authorize the sale of the improvements of any bona fide settler to any purchaser."

It was necessary to use the names of eight persons, because Section 2330 provides that no location of a placer claim shall include more than 20 acres for each individual claimant, and it was considered necessary to secure the largest area allowed to an association by Section 2330, in order to secure the water rights necessary, as the defendant claims, to profitably work the ground. The advantage of securing a large area is obvious, and no doubt selfishness would dictate the claiming of a much larger tract than 160 acres if the utmost limit of the law would permit it. But the policy of the government in disposing of the mineral lands, as well as other portions of the public domain, is to make a general distribution among as large a number as possible of those who wish to acquire such land for their own use, rather than to favor a few in-

dividuals, who might wish to acquire princely fortunes by securing large tracts of such land; and it is contrary to this policy, and to the provisions of Sections 2330 and 2331, for one person to cover more than 20 acres of placer ground by one location by the device of using the names of his employes and friends as locators. *Gird* v. *Oil Co.*, 60 Fed. 545.

If only the contentions of the parties were to be considered, I would hold that the defendant's claim is valid to the extent of 20 acres only, and that he should select the 20 acres within the boundaries of the claim, so as to relinquish all right to the Lost Axe and Clifford locations, and that the complainant be adjudged to have the superior right to the ground claimed by him; but, considering that these claims are within the boundaries of a tract once set apart for an Indian reservation, which has not been opened to occupation by white people for any other purpose than locating, developing and operating mines, it is quite important that, before either party shall be adjudged to have acquired the right to a patent, there should be a showing that the ground claimed is in fact mining ground, containing gold or other precious metals in sufficient quantity to pay for working, and that the purpose of the parties in acquiring title is to develop and operate mines. Having read with care all of the evidence offered, I am forced to conclude that the parties have intentionally refrained from attacking each other on the ground that the land claimed is not subject to entry under the placer mining laws, and that they have assumed that the court would take it for granted that the land claimed is mineral land, in the absence of any dispute in that regard. The defendant claims to have expended $2,000 in locating and developing the Sheep Creek placer claim, but the character of any development work which may have been done is not shown by the evidence; neither does the evidence show the nature of any work done by the complainant or his vendors. In answer to leading questions, two of the complainant's witnesses stated

that they had found gold within the Lost Axe and Clifford claims, and no further questions were asked either upon direct or cross examination; and on the part of the complainant there is no further showing as to the value of his claim for mining purposes. The evidence on the part of the defendant is equally vague and unsatisfactory. Some of the witnesses testify that they found a number of colors; that they found evidence of placer-mining work having been done in the past; that miners who had been engaged in such work had been driven away by the Indians. There is other testimony to the effect that this ground is richer than some other ground along the Columbia river, but there is no evidence whatever as to the value of the Columbia river ground referred to for mining purposes. I am unable to draw even an inference as to the value of this ground by comparison with unidentified ground in the vicinity of the Columbia river. Presumably, the land and water rights are valuable for purposes other than mining, and, without evidence to show affirmatively that the land located is the character of land which the law authorizes individuals to enter, the court cannot decide that either party is entitled to receive a patent. For lack of evidence that the ground in dispute, or any part of it, is subject to entry under the laws as placer-mining ground, it will be decreed that neither party is entitled to any part of the land claimed.

THEODORE FOX v. JOHN W. MACKAY ET AL.

(125 California 54; 57 Pac. 672. Supreme Court. June 14, 1899.)

[1]**Average assay.** Under a contract between a mining company and a milling company the latter was to treat the ore in the usual and ordinary manner and "returns therefrom shall not be less than 70 per cent. of the pulp assay."—The mill was not bound to return 70 per cent. on each ton of ore, but was bound to show such average return on all the ore furnished.

De minimis. A general allegation that returns fell short of the 70 per cent. not stating the shortage will be construed as the smallest fraction of one per cent. and the maxim *de minimis non curat lex*, applied.

Department 1. Appeal from Superior Court, City and County of San Francisco.

Action by Theodore Fox against John W. Mackay and others. Judgment for defendant, and plaintiff appeals. Affirmed.

[1]Amount of moisture is determinable by tests of like ore from same mine. *Vietti* v. *Nesbitt*, 18 M. R. 247.

Under a contract to buy ore with a certain per cent. of zinc, the buyers are not bound to assay the ore before receiving it and are not estopped from showing that it contained less than the agreed per cent. *Trotter* v. *Heckscher*, 40 N. J. Eq. 612; 4 Atl. 83.

Ore buyers held not entitled to deductions for moisture after accepting ore without question on this point. *Trotter* v. *Heckscher*, 42 N. J. Eq. 251; 7 Atl. 353.

A lessee agreed to furnish an ore buyer with regular shipments of ore, on default the ore buyer to take possession and get the ore himself. Contract upheld and ore buyer put in possession. *Lehigh Co.* v. *Trotter*, 43 N. J. Eq. 185; 10 Atl. 608.

Construction of iron ore contract as to assay value. *Anvil M. Co.* v. *Humble*, 18 M. R. 98.

Contract for iron ore to run at least 50 per cent. is broken by tendering ore of 48 per cent. *Martinez* v. *Earnshaw*, 143 Pa. 479; 22 Atl. 668.

Duty payable on wet weight without allowance for moisture. *Earnshaw* v. *Cadwalader*, 145 U. S. 247.

H. G. SIEBERST, for appellant.

W. E. F. DEAL and EDMUND TAUSZKY, for respondents.

GAROUTTE, J. This action is brought by Fox, a dissatisfied stockholder of the Consolidated California & Virginia Mining Company (a mining corporation), in behalf of the corporation, against the Comstock Mill & Mining Company, J. W. Mackay, J. P. Jones, and the Consolidated California & Virginia Mining Company. Mackay and Jones are the real defendants in interest.

By the complaint, conspiracy and fraud are alleged against Mackay and Jones in the milling of the ores of the Consolidated California & Virginia Mining Company, and an accounting is asked. Under the contract entered into between the mining company and the milling company and Jones, by which the ores were to be milled, it was provided: "Said ores, rock, and earth shall be worked in the usual and ordinary manner of working like ores, and returns therefrom shall not be less than seventy (70) per cent of the pulp assay."

This appeal is taken from the judgment rendered against plaintiff, and the sole question raised revolves around a single allegation of the complaint, taken in connection with certain denials and allegations of the answer relating to the same subject-matter.

Defense on ore contract to make shipments, that payments were not made when ore actually delivered. ***Cherry Val. Iron Works*** **v.** ***Florence Co.*** **64 Fed. 569.**

Like case as to delivery and also assignment of such contract. ***Wheeler*** **v.** ***Walton Co.*** **64 Fed. 664.**

Ore purchase contract not assignable. ***Winchester*** **v.** ***Davis Pyrites Co.*** **67 Fed. 45.** ***Arkansas Val. Co.*** **v.** ***Belden Co.*** **127 U. S. 379.**

Smelter custom to pay 95 per cent. of product. ***Silver Valley Co.*** **v.** ***North C. Sm. Co.*** **19 M. R. 339.**

Plaintiff alleges that 734,000 tons of ore were milled under the said contract with Jones and the milling company, and, after alleging various other matters, declares: "And for the fraudulent purposes above stated said ores were milled and crushed by the said Comstock Mill & Mining Company in a very superficial and imperfect manner, so that an unusually small percentage of the precious metals was extracted therefrom and returned to the said Consolidated California & Virginia Mining Company, and plaintiff enumerates that less than seventy (70) per cent was returned by said milling company to the said Consolidated California & Virginia Mining Company for more than 41,225 tons of the ore of the said Consolidated California & Virginia Mining Company, milled and reduced by the Comstock Mill & Mining Company."

It is now claimed that this allegation of the complaint is admitted, and that by reason of such admission a breach of the contract as to a return of 70 per cent of the pulp assay is shown, and that, therefore, judgment to that extent, at least, should have gone for plaintiff. For various reasons there is no merit whatever in the point urged. Passing, for a moment, the sufficiency of the denials found in the answer bearing upon this allegation of the complaint, we are satisfied the allegation itself is not sufficient to support a judgment. First, there is no statement in the allegation that the "seventy per cent" has any reference whatever to the pulp assay. As far as the allegation indicates, it may have been any other assay. Again, invoking the rule that the pleading should be construed against the pleader, we may assume that this shortage under 70 per cent was the smallest fraction of 1 per cent, and, such being the case, the rule of "de minimis" would bar a recovery. Again, by any construction of this covenant in the contract, it may be fairly assumed that upon an honest and modern milling of the ore the milling company was bound to return an average of at least 70 per cent of the pulp

assay. Whether this average was to be based upon the daily or monthly output milled, or based upon the output for the entire life of the contract, we are not concerned; for it is plain that the milling company was not bound to return at least 70 per cent of the pulp assay on each particular ton of ore milled. This is apparent, for no mode or means is provided under the contract by which such figures could be obtained. Indeed, the whole history of working and milling ore is opposed to any such construction of the contract.

We find no allegation that these 41,000 tons of ore were milled in any particular day or month or year. The pleading does not contradict the conclusion that the milling of this particular ore was scattered along at regular or irregular intervals throughout the entire life of the contract. If this allegation of the complaint is not strengthened by the allegations of the answer, we hold it insufficient; and the allegations of the answer, upon careful consideration, weaken, rather than strengthen, plaintiff's pleading. While we find a direct admission in the answer that for four certain months the return to the mining company was less than 70 per cent of the pulp assay, yet we find the further allegation, "And that while the average for said months was less than 70 per cent, as above specified, yet the returns from all of the ore worked during said months were not less than 70 per cent of the pulp assay; and that said average was made up in the succeeding months." It thus appears that, while the monthly returns for these four months fell below seventy per cent of the pulp assay, yet thereafter additional returns came in from the ores milled during these months, which brought the percentage within the stipulations of the contract.

For the foregoing reasons the judgment is affirmed.

VAN DYKE, J., and HARRISON, J., concurred.

Hearing in bank denied.

HARRIET H. SAUNDERS v. LA PURISIMA GOLD MINING CO. ET AL.

(125 California 159; 57 Pac. 656. Supreme Court. June 20. 1899.)

When too late to attack. Where the land has been surveyed, sectionized and designated by the land department as agricultural school land and later patented by the state, the title is beyond attack as being mineral land.

The grant of sections 16 and 36 to the state under the act of 1853 was a grant *in presenti*, and if at that time there were no known minerals, or other exceptions noted in the grant, those sections then became the land of the state.

In Bank. Appeal from Superior Court, Tuolumne County.

Action by Harriet H. Saunders, as administratrix, against the La Purisima Gold Mining Company and others. Judgment for plaintiff, and from an order granting a new trial she appeals. Reversed.

J. B. CURTIN, for appellant.

J. P. O'BRIEN, for respondents.

VAN DYKE, J. This action is to determine conflicting claims to a tract of land, being a portion of Section 36, Township 2 North, Range 13 East, Mt. Diablo meridian, containing 600 acres, located in Tuolumne county.

Land known to be mineral at date of state admission is excepted from school land grants. *State* v. *McBride*, 18 L. D. 199.

Mineral lands are not included in the California School grant. Such lands afterwards worked out and abandoned do not become State lands. *Hermocilla* v. *Hubbell*, 89 Cal. 5; 26 Pac. 611.

Mining location cannot be made on school lands after survey. *Wheeler* v. *Smith*, 5 Wash. 704; 32 Pac. 784.

On September 1, 1870, the official United States survey of said township was completed, and the lands therein sectionized. On the 18th day of February, 1871, the official plat of said township was approved by the United States surveyor general for California, and filed in his office. In this official plat of said township, Section 36 was marked and returned as being agricultural land and unoccupied. On the 7th day of December, 1871, the commissioner of the general land office directed the register of the United States land office at Stockton, in which district said land was located, to withhold from sale or disposal, among other lands, said Township 2; and on April 27, 1880, the secretary of the interior, by an order, revoked said withdrawal, and thereafter on September 6, 1884, the register of said United States land office issued to the state of California his certificate in due form, reciting that there were no persons occupying or in possession of any portion of said Section 36, and there were no homestead preemptions or other valid claims thereto, or to any part thereof, adverse to the state of California. On the 1st day of September, 1890, the state of California issued to Robert B. Parks its patent in due form for the premises in controversy. Thereafter, on December 11, 1895, by proper mesne conveyance, the title to said lands was granted to, and became vested in, the plaintiff's intestate, Henry H. Saunders; that said Saunders thereupon entered into possession, and with his family occupied said tract of land up to the time of his death, June 20, 1897, and the plaintiff thereafter continued in such possession. In August, 1896, defendants Elder and Maguire entered upon a portion of said described lands, and commenced to run a tunnel and work a quartz claim, and thereupon filed a notice of mining location, designating the same as "the north extension to the La Purisima claim." This action was commenced in August, 1897. Defendants Elder and Maguire rely upon said mining location, and contend that said land is mineral land, and never passed to the state

of California, and that the patent issued therefor is void. All the other defendants were defaulted. On the trial defendants offered "to prove that the land in controversy—namely, the north extension of the La Purisima Quartz Mining Claim —was expressly excepted from the grant to the state of California by the act of congress approved March 3, 1853, as the same is mineral land." Plaintiff's objection to this offer was sustained by the court, and judgment went for the plaintiff. Thereafter, upon motion of the defendants, the court granted a new trial on the ground, as stated in the order, "for the sole reason that the court erred in sustaining the objection to said defendants Maguire's and Elder's offered evidence as to the mineral character of the land in controversy."

This appeal is from the order granting a new trial, and the question presented here is whether the court did or did not err at the trial in excluding the offered evidence.

The respondents rely upon *Hermocilla* v. *Hubbell,* 89 Cal. 5, 26 Pac. 611, in support of the order of the court granting them a new trial. Although the facts in that case are different from those in this, still it must be confessed that said case furnishes support to the contention of respondents. The opinion seems to rely upon *Mining Co.* v. *Consolidated Min. Co.,* 102 U. S. 168, and it is said with reference thereto: "That decision is controlling, and must be followed here. The question then remains, were the disputed premises at the time of the grant, mineral land—that is, known to be valuable for minerals?"

The facts, as found in *Hermocilla* v. *Hubbell,* were that, during the year 1850, and continuously ever since, and when the said patent was issued, on the 10th day of December, 1870, and at the time of the survey of said lands (being a portion of the sixteenth section), "they were, and have been, and now are, known to be public mineral lands of the United States, having therein known valuable mineral deposits"; whereas, in the United States case, referred to by the com-

missioner as controlling, and to be followed by this court, the facts were that there were three mining claims on the land in controversy—one located in 1851, another one in 1858, and the other in 1863—the last being seven years before the public survey of the tract, which was in 1870. The mining patent was applied for on these locations nearly two years before the state patent was issued, and subsequently, and within a year thereafter, the United States patent was issued on said mining locations. Hence the contest in that case was between two conflicting patents; whereas, in *Hermocilla* v. *Hubbell,* the contest was in the nature of a collateral attack upon a state patent, on the ground that the land was mineral land. It is said in the latter case: "The question then remains, were the disputed premises at the time of the grant mineral lands—that is, known to be valuable for mineral lands?" But another and equally important question seems to have been overlooked by the court in that case, and that is, by whom and at what time are the facts to be ascertained and determined as to the character of the land at the time of the grant, whether mineral or non-mineral? And another question of equal importance is as to the effect of a patent, issued by competent authority, purporting to convey such land.

The decisions of the supreme court of the United States upon both of these questions are so numerous and so uniform (and the decisions of this court are in the same line, with few exceptions) that both questions now ought to be considered well settled. The first is that by the laws of congress providing for the patenting of certain public lands, upon the ascertainment of certain facts, the proper officers of the land department of the general government have jurisdiction to inquire into and determine those facts; that is, if a large body of public lands be subject to sale or other disposition, but subject to reservation of such parts as may be found to be of a particular character, as swamp or mineral land, the land department has jurisdiction to determine the character

of any part thereof, and its decision is conclusive. In *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389, Mr. Justice Field, speaking for the court, says: "We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlooked our decisions on that subject. That department, as we have repeatedly said, was established to supervise various proceedings whereby evidence of a title from the United States to portions of the public domain is obtained, and to see that the different requirements of acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of a class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

In this case it was shown that the land in question was surveyed and sectionized; whereas, the act of congress directed that, in case of mineral lands, it should not be sectionized, and that the plat of survey showing the land to be agricultural land—in other words, not mineral—was returned and properly approved. As a further measure of precaution, and to allow abundant opportunity for a full investigation and ascertainment of the character of the land, the disposal of the same was suspended for a number of years, and finally, it having been determined that it was of the character of land subject to be granted to the state, a certificate was issued by the proper United States authorities to the state of California, certifying its right to the section of land in question under the grant of 1853. The state's patent thereupon issued

to the plaintiff's grantor long prior to the intrusion of the defendants for the purpose of mining. Under the rule just cited, this concluded the investigation as to the character of the land, except on a direct proceeding to set aside the patent on the ground of fraud or other invalidity.

The case of *Gale* v. *Best,* 78 Cal. 235, 20 Pac. 550, seems to have been overlooked—at any rate, it is not noticed—in the preparation of the opinion in *Hermocilla* v. *Hubbell, supra.* In that case the plaintiff claimed under a patent to a tract of land under a railroad grant. The defendants claimed by right of possession, upon the ground that it was mineral land, and that all mineral lands are reserved in the grant of congress to said railroad company. In affirming the judgment of the court below, this court, after reviewing quite fully the cases bearing upon the question, says: "Our opinion is that where a patent issue for public land under a law which provides for its disposition as agricultural land—either to a railroad company or to pre-emption or homestead claims—and there is no reservation in the law except a general one of mineral lands, and no reservation at all in the patent, then the patent must be considered as a conclusive determination by the government that the land is agricultural." This case was referred to and approved in *Dreyfus* v. *Badger,* 108 Cal. 58, 41 Pac. 279, which, it will be seen, was some time after the Hermocilla case, relied upon by the respondent here. Dreyfus, the plaintiff, relied upon a state patent issued on state lieu school lands, and the defendant, as a pre-emptioner, antedating his right as such prior to the patent by the state. In affirming the judgment of the lower court, this court says: "A defendant may defeat an action of ejectment by showing that plaintiff has no title. But where a patent, regular on its face, has been issued by the government (federal or state) for land which it owns, under a law providing for the disposal of the land patented, upon the ascertainment of certain

facts, the officers of the land department of the government have jurisdiction to determine such facts, and the issuance of a patent is, upon collateral attack, a conclusive declaration, as against all claiming under said government, that the facts have been found in favor of the patentee. 'And this rule applies to the determination of the particular character of the land which is the subject of the patent.' This was expressly held in *Gale* v. *Best,* 78 Cal. 235, 20 Pac. 550, where we alluded to the authorities at some length, and, basing our conclusion on decisions of the supreme court of the United States (citing a number), we declared the law to be as above stated. These cases involved patents of the general government; but, upon principle, the rule applies with equal force to a patent of the state government. Moreover, it has been so expressly held in this court in *Doll* v. *Meader,* 16 Cal. 295, where it was decided that 'the patent is the record of the state that the land was subject to location under the grant of the United States, and has been located'; and *Ah Yew* v. *Choate,* 24 Cal. 562, where it was held that the patent is also 'a record of the judgment of the state, by its officers duly appointed for that purpose, and that the conditions and characteristics of the land were not such as to constitute it mineral, within the meaning of the provisions of the statute.'" *Irvine* v. *Tarbat,* 105 Cal. 237, 38 Pac. 896, is to the same effect, and is refered to and approved in *Dreyfus* v. *Badger.*

To quote from the numerous adjudicated cases in the United States supreme court would be a waste of time, and lengthen this opinion beyond reasonable limits, and it will be sufficient merely to refer to some of them. *Steel* v. *Refining Co., supra; St. Louis Sm. Co.* v. *Kemp,* 104 U. S. 644; *French* v. *Fyan,* 93 U. S. 169; *Barden* v. *Railroad Co.,* 154 U. S. 288, 14 Sup. Ct. 1030; *Wright* v. *Roseberry,* 121 U. S. 488, 7 Sup. Ct. 985; *Heath* v. *Wallace,* 138 U. S. 573, 11 Sup. Ct. 380; *McCormick* v. *Hayes,* 159 U. S. 332, 16 Sup.

Ct. 37. See, also, *Cowell* v. *Lammers*, 10 Sawy. 250, 21 Fed. 200.

The cases relied upon by the respondents, when examined, it will be seen, do not conflict with the general tenor of the decisions already cited. In those cases the lands in question were shown not to have been subject to sale or disposition at the time the right alleged accrued on which the patent was issued, and the patents, therefore, were issued without authority of law. For instance, *Burfenning* v. *Railway Co.*, 163 U. S. 321, 16 Sup. Ct. 1018, involved title to certain islands in the Mississippi at Minneapolis. At the date of the homestead selection in that case on which the patent was issued, these islands were within the limits of said city; and the invalidity of the patent was based upon the fact that "lands included within the limits of any incorporated town, or selected as the site of a city or town," were by the laws of congress excluded from the right of pre-emption and homestead claims. The court of course sustained that contention on the ground that the action of "the land department cannot override the express will of congress, or convey away public lands in disregard or defiance thereof." At the same time the court announced this as a rule:

"It has undoubtedly been affirmed over and over again that in the administration of the public-lands system of the United States questions of fact are under the consideration and judgment of the land department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department one way or the other, in reference to these questions, is conclusive, and not open to litigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined."

Citing *Johnson* v. *Towsley*, 13 Wall. 72; *St. Louis Sm. Co.* v. *Kemp* and *Steel* v. *Refining Co.*, *supra*; *Wright* v. *Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985; *Heath* v. *Wallace*,

138 U. S. 573, 11 Sup. Ct. 380; *McCormick* v. *Hayes*, 159 U. S. 332, 16 Sup. Ct. 37.

As already stated and held in numerous cases, the grant by congress to this state of the sixteenth and thirty-sixth sections, by the act of congress of 1853, was a grant in præsenti, and, if at that time there were existing no known minerals or other exceptions noted in the grant why the lands should not pass to the state, it at that moment became the land of the state. The investigations of the officers of the land department in this case show that the land in question did not fall within any of the exceptions or limitations contained in the act; and subsequently, and long prior to any claim on the part of the defendants, the land was properly certified to, and patented by, the state to the plaintiff's grantor. Any rule which would permit intrusion upon the premises so conveyed and patented by the state, under such circumstances, long after the lands had passed into the hands of presumably innocent third parties for value, would be a reproach to our laws and jurisprudence.

If such claims as that presented by the defendants here were sanctioned by the court, a patent to lands in this state, instead of being a muniment of title, would simply be an invitation to parties to invade the premises for the purpose of ascertaining whether facts and conditions existed prior to the grant or patent so as to avoid the same; and it would be the same whatever the nature of the land might be. In case of a patent to mining lands, an investigation could be had years after the date of the patent, and after the title to the ground had passed to innocent third parties, to determine whether it was not agricultural land, and more valuable for that purpose than for mining; or, in case of a pre-emption or homestead claim, patented by the United States, an investigation could be set on foot at any period, and as against any party, whether innocent or otherwise, who might be the holder of the title, to ascertain whether the land was, at the initiation

of the claim on which the patent is based, of the character subject to pre-emption or homestead—for instance, that it was mineral land, or swamp or overflowed land, or any other class falling within the exceptions specified in the laws of congress. Such a condition as this would be simply intolerable, and there would be no confidence or certainty in land titles in this state.

The court below properly sustained the objection to the offered testimony, and its judgment was correct, and should have been allowed to stand.

The order granting a new trial is reversed.

GAROUTTE, J., HARRISON, J., MCFARLAND, J., TEMPLE, J., HENSHAW, J., and BEATTY, C. J., concurred.

J. H. BRAMLETT ET AL. v. JOHN J. FLICK ET AL.

(23 Montana 95; 57 Pac. 869. Supreme Court. July 3, 1899.)

Sufficient description. A notice of location of a mining claim which by reference to natural objects and monuments erected by the locator, contains directions which, taken in connection with such objects, would enable a person of ordinary intelligence to find the claim and trace its boundaries, is sufficient.

[1]**Whether or not a claim could be ascertained from such notice** and the proof in regard to the surroundings is for the jury.

Distance from other claims. In an action to determine adverse claims to a mining claim, a notice of location which described a claim as being situated in a certain county, a certain distance from another claim, and defined by courses marked by substantial monuments, readily identified by marks thereon, taken in connection with evidence that the locator discovered gold-bearing quartz, and made a monument at the place of discovery, upon which he posted his notice of claim, shows prima facie ownership of such claim.

Ouster. Where one enters upon the mining claim of another under claim of title thereto, and mines thereon, and warns such other not to mine thereon, such conduct amounts to an ouster from the territory of the latter claimed by the former.

Surveyor explaining map. Where one mining claim encroaches upon another, it is not error to permit the engineer, who has made a plat thereof, to point out the exterior boundaries of the encroaching claim, as it tends to enlighten the jury as to the controversy.

Opinion question. A question as to whether a practical surveyor, familiar with the method of locating claims, and familiar with sur-

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[1]Whether the claim was sufficiently marked on the ground is a jury question. *Farmington Co.* v. *Rhymney Co.* 20 Utah 363; 58 Pac. 832.

A party cannot on appeal, rely on a location not pleaded below. *McPherson* v. *Julius*, S. Dak. ; 95 N. W. 428.

A location in excess of the legal length is void only as to the excess feet. *Id.*

A location without a discovery is not valid. *Id.*

A location made conflicting with another prior location, if a proper discovery is made, is valid against all persons, except the prior locator; and if the claim of the prior locator is abandoned, forfeited, or any part of the claim in conflict is not rightfully held by the prior locator, the subsequent location attaches to so much

veys in mountainous countries and with the neighborhood, could take the description in a notice of location of a claim, and, starting at the point of discovery, find the claim described therein, is incompetent, as calling for an opinion.

[2]**Proof as to blazes.** In an action to determine the boundaries of conflicting mining claims, evidence as to whether or not a surveyor found the boundaries of a claim without assistance, whether the blazing upon posts appeared to be old or new, and whether he could readily find the blazes on the trees along the boundaries, and whether they could be traced from one to another, relates to matters of fact, and is not open to the objection of being opinion evidence.

Invasion by second party within the 20 days. Under Comp. St. div. 5, § 1477, which provides that the discoverer of a mining claim shall have 20 days in which to complete the location and make the necessary record, a discoverer who posted in plain view a notice of location, and "claim of 1,500 feet on this lead, with twenty days for prospecting," if he made it in good faith, and with an intention to complete his location within the prescribed 20 days, thereby acquired a right to all the ground along the lead legitimately covered by his notice; and one locating thereon subsequently to such notice, and prior to the expiration of the 20 days, does not acquire a superior title, though he filed his statement and record within 20 days, and the former did not.

[3]**Equal distance presumed.** A notice, posted by the locator of a claim, that he claims 1,500 feet on a lode, will be construed to limit his claim to 750 feet along the lode on either side of the point of discovery.

The fact that the location includes ground not legitimately covered by the notice does not invalidate the location outside the overlap.

Appeal from District Court, Flathead County; Charles W. Pomeroy, Judge.

of the ground not legally held by the prior locator as is within the lines of the subsequent location. *Id.*

[2]A location certificate was made by reference to U. S. Subdivisions; the official survey was, at the time, not approved but in dispute: *Held*, that the reference was good whatever might be the final decision on the survey. *Gird* v. *California Oil Co.* 18 M. R. 45.

Mistake in course, northerly for northeasterly, does not vitiate. The stakes control the courses. Record must show the names of locators, date of location and description; reference to one well-known claim is sufficient compliance. *Book* v. *Justice Co.* 17 M. R. 617.

Action by J. H. Bramlett and others against John J. Flick and another. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

G. B. WINSTON and C. H. FOOT, for appellants.

SANFORD & GRUBB, for respondents.

BRANTLY, C. J. In this action the plaintiff seeks to recover possession from defendants of a portion of the surface ground of the Blacktail lode claim, situate in Missoula (now Flathead) county. The complaint alleges ownership and right of possession in plaintiffs of 1,500 feet along the lode, and 300 feet on either side from the middle or center thereof, under and by virtue of a discovery and location thereof on July 12, 1892, and a compliance with the laws of the United States and the state of Montana, by proper record of their declaratory statement. It is then alleged that on or about August 20, 1894, the defendants entered upon a portion of the claim, ousted plaintiffs therefrom, and now unlawfully withhold the same from them, to their damage in the sum of $200.

The defendants, after denying the allegations in the complaint, set up title, right of possession, and possession, in

A stake at each corner and the center of each end line of a placer is a sufficient marking of boundaries. *McIntosh* v. *Price*, 121 Fed. 716.

Full set of instructions on the mode of making placer location and keeping up assessment work, set forth at length and approved. *Walton* v. *Wild Goose Co.* 123 Fed. 209; 22 M. R.—.

A single tie to a Patent corner is sufficient. *Carlin* v. *Freeman*, Colo. App. ; 75 Pac. 26.

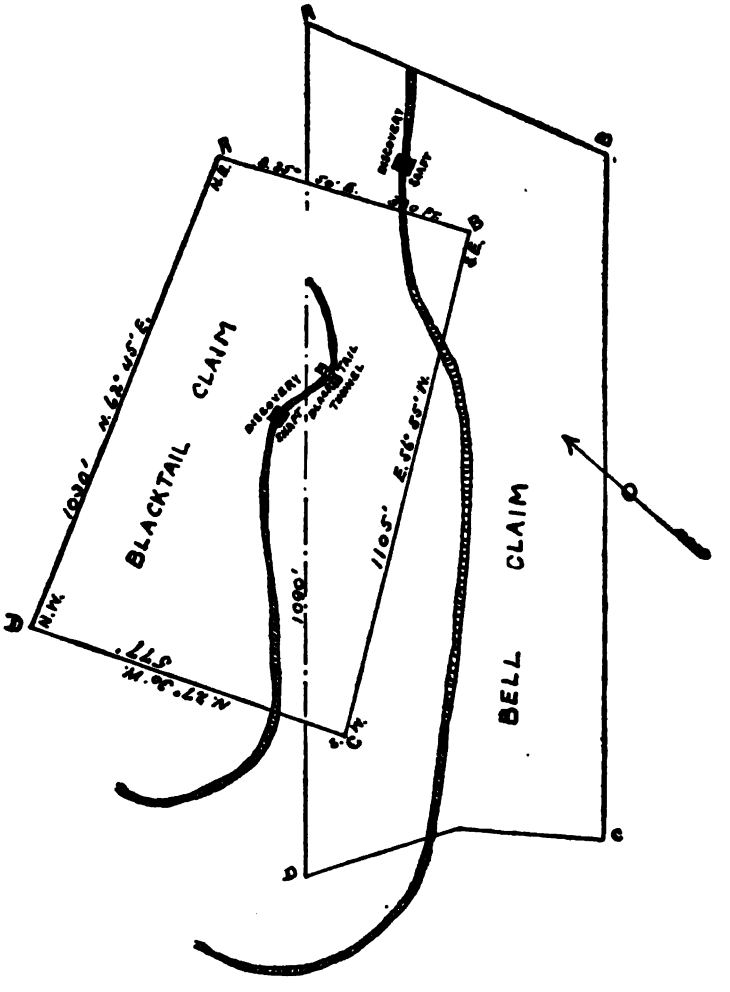
In the absence of proof impeaching the facts stated in a declaratory statement it is immaterial to the adverse locator that the declaration was verified on information only. *Mares* v. *Dillon*. *Mont.* ; 75 Pac. 963.

[3]*Erhardt* v. *Boaro*, 15 M. R. 472.

themselves, under a location called the "Bell Lode Claim," alleged to have been made by them prior to that of the plaintiffs. They allege the facts of their discovery, location, and a compliance with the law necessary to a valid claim. They further allege that the boundaries of the Bell lode claim conflict with those of the Blacktail lode claim, particularly describing the conflicting area by metes and bounds, and claim that they are lawfully in possession of this area under their prior location. The complaint does not describe this area, but in the trial court proof was introduced by the plaintiffs identifying it, and the case was treated by both parties as if the complaint contained a proper description. No question is made here on this point. We shall therefore assume that the complaint is sufficient in this regard, and so treat it.

The trial in the court below resulted in a verdict and judgment for the plaintiffs. The case comes here, on appeal from the judgment and an order overruling defendants' motion for a new trial.

1. The plaintiffs first produced evidence of what plaintiff Bramlett, who made the location of the Blacktail claim, did at the time of the location, in the way of making a discovery, posting his notice, and marking the boundaries of the claim. His evidence was supplemented by that of A. L. Jaqueth, a mining engineer, who had made a survey of both claims a few days before the hearing. As an exhibit to his statement, there was introduced in evidence a plat or diagram made by him from this survey, showing the relative positions of both claims, the courses and extent of their boundary lines, and the area in conflict. For illustration, and for convenience for reference, this diagram is inserted here:



Thereupon, over the objection of the defendants, the court admitted in evidence a copy of the notice of location of the Blacktail claim, filed for record on August 1, 1892. The ground of the objection was that it is incompetent, immaterial, and irrelevant, in that it contains no such description of the claim with reference to natural objects or permanent

monuments, as will identify the claim, and that the evidence up to that point showed that the claim is not correctly described in the notice. The notice, after stating that the plaintiffs' claim extends 750 feet easterly and westerly from the discovery shaft upon the lode, and 300 feet on either side of the center or middle thereof, proceeds:

"This lode is situated in an unorganized mining district in the county of Missoula and state of Montana, on a branch of Foundation Fisher creek, about six miles N. W. of where Thompson Falls crosses same. The adjoining claims are none, the Golden Eagle being about one mile S. E. from the Blacktail. The exterior boundaries of this location are distinctly marked by posts or monuments at each corner of the claim, so that its boundaries can be readily traced, viz.: Beginning at N. E. corner post, marked 'A,' and running from thence six hundred feet in a southerly direction to S. E. corner post, marked 'B'; from thence fifteen hundred feet in a westerly direction to S. W. corner post marked 'C'; from thence six hundred feet in a northerly direction to N. W. corner post marked 'D'; and from thence fifteen hundred feet, in an easterly direction, back to post A, place of beginning."

The evidence of plaintiff Bramlett tended to show that he went upon the ground on July 12, 1892, and made a discovery, at the point marked "Discovery Shaft" on the diagram, of quartz in place, containing free gold; that this was from 9 to 10 o'clock in the forenoon; that he proceeded at once to make the location by piling up a monument of stone at the point of discovery, and putting up a substantial copy of the recorded notice there; that he then staked both ways 750 feet; that he put up the northeast corner first, and then the others, going from this point around the claim, and back to the place of beginning; that at the northeast and northwest corners he cut off trees four or five feet from the ground, and squared the stumps; that at the other two corners he blazed standing trees on four sides; that he also put up a center end stake at the east end of the claim; that the corners were marked "A," "B," "C," and "D," in order, preceded by

the name and date, "Blacktail, July 12, 1892;" that the east end center stake was a tree, blazed and marked; that he was engaged at the location until about noon, and that he saw no signs of prospecting there; that the ground covered by the claim is rough and mountainous, with cliffs towards the northwest, sloping rapidly down towards West Fisher creek on the north and northeast, and covered partly with undergrowth and down timber; that he had to guess at the courses, and had no means of measuring the distances, other than by stepping from point to point; that the Golden Eagle claim was located by himself on June 27, 1892; that this claim is on Bramlett creek, which is about a mile southeast of the Blacktail claim; that his camp where he stayed during his prospecting was on Bramlett creek; that there is no such stream as Foundation Fisher creek, but that Foundation is a flat down below on the main or West Fisher creek, where the Thompson Falls trail crosses West Fisher creek, and from which the trail up to Bramlett creek and the Blacktail country leads; that the Blacktail claim is in fact located on West Fisher creek, and not on a branch of it; that at the time the location was made he supposed it was on a branch of the West Fisher, but that it is upon the main stream; that he afterwards at various times, saw all the posts put up by him upon the claim, and that they all remained there until about the beginning of this action, except the northwest corner, which he discovered, in the spring of 1896, had disappeared, and that he restored it at that time by setting up as near the same place as possible a post similar to the original one, and marking it, "Post Restored;" and that the plat introduced in evidence is a fairly correct representation of the claims, and their relative positions.

This witness became somewhat confused in giving the directions from each other of the boundary posts upon the claim, and the course he went from the place of beginning at the time he made the location. In the notice it is stated that post

B is in a southerly direction from post A. In his testimony he states he went from post A to B in an easterly direction. From the plat it appears that he went in a direction S., 35° 50′ E. Again, the southwest corner is given in the notice as westerly from post B at the southeast corner, while he states that he went in a southerly direction from post B to this corner. The plat shows that this direction is S., 56° 55′ W. In another part of his testimony he also states that the Blacktail claim is southwest from the Golden Eagle about one mile, thus placing it a mile or more from the locality given it in the notice. It further appears from the plat and the testimony of Jaqueth that the distances from post to post mentioned in the notice are materially greater than these distances as actually measured. Jaqueth states that there was some difficulty in finding the claim at the time of the survey, and that the plaintiffs were compelled to call to their assistance one McGovern, who knew the country well, before they could locate it. Jaqueth further testifies that at the time the survey was made the country was covered with a deep snow, and that it was necessary for the surveying party, in order to find the corners, to dig down into the snow. It was upon the ground of these inconsistencies and discrepancies in the proof offered in support of the notice, as preliminary to offering it in evidence, that the objection to its admission was predicated. At first glance, the inconsistencies do seem glaring and irreconcilable, but upon closer view they in large measure disappear; at least, they so far disappear, or are explained away by other parts of Bramlett's statements, that we think the court was right in overruling the objection and allowing the notice to go to the jury. The reference in the notice to Thompson Falls crossing and Foundation Fisher creek certainly gives no aid in identifying the claim, in view of Bramlett's statement that no such place exists. But this reference may be omitted entirely, and still enough be left in the notice, by way of reference to the other objects, to

go to a jury, under the evidence applying the other objects mentioned to the locality surrounding the claim, and identifying the monuments upon the claim itself. Lindl. Mines, § 383; *Flavin* v. *Mattingly,* 8 Mont, 242, 19 Pac. 384; *Gamer* v. *Glenn,* 8 Mont. 371, 20 Pac. 654; *O'Donnell* v. *Glenn,* 8 Mont. 248, 19 Pac. 302; *Hoffman* v. *Beecher,* 12 Mont. 489, 31 Pac. 92; *Upton* v. *Larkin,* 7 Mont. 449, 17 Pac. 728; *Russell* v. *Chumasero,* 4 Mont. 309, 1 Pac. 713; *Brady* v. *Husby,* 21 Nev. 453, 33 Pac. 801. "It is not for the court to say, by merely looking at a record or declaratory statement, what are or what are not permanent objects or monuments. That is a matter of proof. A stake or a stone of the proper size, and properly marked, may be a permanent monument. A declaratory statement or record thereof, with a reference to permanent stakes or monuments, which did not exist as a fact on the ground, would not be good, while a defective description in the record or declaratory statement might be cured if the stakes or monuments on the ground identified the claim." *Russell* v. *Chumasero, supra.* The reference to the Golden Eagle claim is definite enough to allow the notice to be submitted to the jury. True, Bramlett places it in a direction different from the one stated in the notice; but subsequently this error is corrected by a statement that this latter claim is on Bramlett creek, and that the creek is about a mile southeast from the Blacktail claim. This statement is further aided by his testimony in another part of it, where he states that his camp was on Bramlett creek. This camp is more than once referred to by him as "my camp on Bramlett creek," and appears to have been a point on the creek at which the prospectors in that vicinity casually met from time to time in passing to and from the mountains. The fact that the Golden Eagle claim had been located by Bramlett himself on the 17th of the previous month did not necessarily raise a presumption that it was not well known at the time of the location of the Blacktail. In the absence of proof to the

contrary, the presumption attached that it was well known. *Hammer* v. *Milling Co.,* 130 U. S. 291, 9 Sup. Ct. 548; *Id.,* 6 Mont. 53, 8 Pac. 153; *Book* v. *Mining Co.,* 58 Fed. 106. It is fair to suppose that such was the case, since it appears from the proof that it was among the first locations made in that part of the country, and that the miners going up into that section passed up and down Bramlett creek near where it was located. At any rate, the question was for the jury. *Dillon* v. *Bayliss,* 11 Mont. 171, 27 Pac. 725; *Metcalf* v. *Prescott,* 10 Mont. 283, 25 Pac. 1037, and the other authorities cited. Even upon the presumption that this claim was not well known, still there is reference to marked stakes and trees upon the Blacktail claim itself, which the jury, under the authority of the cases cited, and under the proof so far given, might find to be permanent monuments. The discrepancies between the actual courses and distances and those stated in the notice do not necessarily vitiate the notice. "A mistake in the certificate as to the direction and course, such as 'northerly' instead of 'northeasterly,' the description being aided by the monuments on the ground, is of no moment." Lindl. Mines, § 381; *Sanders* v. *Noble,* 22 Mont. 110, 55 Pac. 1047; *Book* v. *Mining Co., supra.* It is sufficient if the description in the notice "contains directions which, taken in connection with such boundaries, will enable a person of reasonable intelligence to find the claim and trace the lines." Lindl. Mines, § 381. The courts always construe these notices liberally, and if, by any intendment, the proof can be reconciled and made consistent with the statement contained in them, the jury will be allowed to say whether or not, upon the whole proof, the identification of the claim is sufficient.

2. At the close of plaintiffs' case, defendants asked the court to direct a nonsuit upon the grounds (1) that the plaintiffs had failed to show title in themselves, and (2) that they had failed to show that they had been ousted by

the defendants, or, if they did show an ouster by defendants, they had failed to identify the area from which they had been ousted. Sufficient has already been said as to what the proof tended to show touching the facts of plaintiffs' location, and we think the plaintiffs made out a sufficient case in this regard to go to the jury upon the testimony of the engineer and Bramlett alone. Moreover, the statements of Bramlett are materially aided by those of other witnesses who were subsequently examined by the plaintiffs, and particularly by the statement of the witness Geiger, who fixed the location of the Golden Eagle claim almost exactly in accordance with the statement in the notice. He was also corroborated by Geiger, Roderick, and others as to the presence upon the ground of the monuments placed there by him to mark the boundaries. These witnesses saw at various times from early in August, 1892, some or all of them; and Roderick states that they all remained there until it was discovered in the spring of 1896 that the northwest corner had disappeared, when he assisted Bramlett in replacing it.

The defendants contend that the five posts put upon the claim by Bramlett do not mark the boundaries sufficiently. But, under the authorities already cited, this was for the jury, and not for the court, to say, after hearing the proof.

We cannot sustain the contention that the proof fails to show an ouster by defendants, or the area from which the plaintiffs were excluded. The area in conflict is clearly shown by the testimony of Jaqueth, aided by the plat. It is shown by designated metes and bounds. True, this area is not described in the complaint, but the contention is not that the pleading is not sufficient, but that the proof is not sufficient.

As to the ouster, the plaintiffs' evidence showed that defendant Flick in 1895 was actually at work on the lead upon which the Blacktail discovery was made, and within the conflicting area. He had a man by the name of Preston

working at that point. He had previous to this time, in 1895, notified the plaintiffs not to do any other work upon the lead. The plaintiffs were then at work taking out ore at the point marked "Blacktail Tunnel" on the plat. He claimed that this was upon the Bell claim, and that it belonged to him. He remained there and continued the work. He had also been at work there some in 1894. Taking this proof in connection with the fact that the boundaries of the Bell claim cover a considerable portion of the Blacktail, it sufficiently establishes an ouster of the plaintiffs from that part of the claim. An entry upon the land of another under assertion of title is an ouster. *West* v. *Lanier,* 9 Humph. 762. In *Ewing* v. *Burnet,* 11 Pet. 52, it is said: "An entry by one man upon the land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done. In legal language, the intention guides the entry, and fixes its character." See also, *Bath* v. *Valdez,* 70 Cal. 350, 11 Pac. 724, and Lindl. Mines, § 537 et seq. It is rarely the case that actual possession of a mining claim is maintained at all times. It is not often that one is inclosed. The possession is constructive, being drawn to the owner by virtue of his location. When, therefore, another enters upon the claim, asserting ownership therein by virtue of an alleged superior title based upon a location, and exercises dominion over it to the exclusion of the rights of the owner, this amounts to an ouster. We think the evidence on the part of the plaintiffs sufficient to show prima facie ownership in plaintiffs, and an ouster from the conflicting area by defendants.

3. Engineer Jaqueth was asked to point out the exterior boundaries of the Bell claim. This was in connection with his detailed statement, illustrated by the plat, touching the relative positions of the two claims and the conflicting area. The defendants objected to the question, as tending to bring

out an immaterial matter. The court properly permitted him to answer. The evidence tended to enlighten the jury and give them a clear idea of the controversy between the parties.

4. This witness was also called to testify for the defendants in support of the Bell location. He was asked the following question by counsel for defendants: "I will ask you to state whether a practical and experienced engineer and surveyor, familiar with the methods of locating claims, and familiar with surveys in mountainous countries, and with a knowledge of the neighborhood, could take the description given in the notice of [the Bell] location, and, starting at the point of discovery, find the ground or claim included within and known as the Bell location? This was objected to by plaintiffs, and excluded by the court, as incompetent. A specific ground of objection, also, was that the question called for the opinion of the witness as an expert, and not for a statement of fact. Defendants' contention is that the evidence called for should have been admitted in support of the description and references contained in the notice of the Bell location. They insist that the question calls for a statement of fact, and not for an opinion or conclusion. The witness was not examined as an expert. No ground had been laid for this purpose. The question was addressed to him as a practical observer. Nevertheless, even from this view, the objection was sufficient to require a ruling by the court. The affirmative answer evidently expected by counsel would have been equivalent to a statement by the witness that a practical and experienced engineer, familiar with surveys in mountainous countries, with the methods of locating claims in such places, and with a knowledge of the neighborhood, could take the description in the notice, and starting at the discovery, find the claim. This is not a statement of any fact the witness had learned, or could have learned, through his organs of sense. It is simply an opinion as to what would be the

probable result of a trial made by a practical and skilled engineer under a given state of facts. The inquiry appertained to no "question of science, art, or trade." It was directed to a determination of the question of the sufficiency of the acts done by a third person for the purpose for which they were intended, viz., the identification of the Bell claim. This was the question to be answered by the jury upon the same facts which were within the knowledge of the witness. The trial court was therefore clearly right in refusing to permit the witness to state his opinion to the jury.

The defendants cite *Dillon* v. *Bayliss,* 11 Mont. 171, 27 Pac. 725, as supporting their contention. In that case evidence of the same character was offered by the defendant for the purpose of rebutting and overturning the presumption established in favor of plaintiff's claim by the introduction of the notice of location, and the evidence in support of it. The objection made was that the notice was conclusive as to the matter stated in it. This court held that the notice is not conclusive, but that the description and references contained in it can be shown to be unintelligible and delusive. The question of whether the opinions of engineers or prospectors can be admitted for this purpose was reserved, for the court say, "Let it be well understood that we pass upon the objection as it was made and sustained." 11 Mont. 183, 27 Pac. 728. This case is therefore no authority in support of defendants' contention. Other witnesses examined by defendants were asked substantially the same question. Objection was properly sustained to all of them.

This witness (Jaqueth) was further asked whether he found the boundaries of the Blacktail claim without assistance, whether the blazing upon the posts at the west end appeared to be old or new, whether the marks on the boundaries of the Bell claim appeared to be old or new, whether he could readily find the blazes on the trees along the end lines of the Bell claim, and whether they could be traced

or observed from one to the other. Similar questions were put to other witnesses. The court sustained objections to them all on the ground that they called for the opinion of the witnesses. These rulings were clearly wrong. Witness Jaqueth had already been permitted to answer the first of these questions when upon the stand for the plaintiffs. It might have been excluded upon the ground that it was a repetition, but it was clearly competent as reflecting upon the condition of things found upon the ground at the time of the survey. There was a sharp conflict in the testimony as to whether some of the monuments had ever been put upon the Blacktail claim,—particularly as to the northeast and northwest corners. There was some evidence tending to show that these corners had not been put up at the date of the Blacktail location. There was the same controversy as to the situation of the posts upon the Bell claim, and whether they had been put there as early as claimed by defendants. There was also a controversy as to the existence of blazes on the trees along the boundaries of this claim. The evidence sought to be brought out was certainly material, and not open to the objection made. It all consisted of matters of fact, a knowledge of which was gained by the witnesses from observation upon the claim.

5. With the single exception of the particulars just mentioned, the rulings of the trial court upon the admission and exclusion of evidence were correct, so far as our attention has been called to them. In instructing the jury, however, the court adopted an erroneous view of the law touching the rights of defendants under the Bell location. The evidence introduced by defendants tended to establish the following: Defendant Flick went alone upon the ground covered by the Bell claim on July 8, 1892,—four days before Bramlett went there. He was without tools, but went over the ground to see if he could find anything. At the point marked on the plat "Discovery Shaft," he found a

lead cropping out of quartz in place, bearing gold. After examining the lead, which he could follow along by its croppings, he cleaned off the surface of a tree standing at the discovery point, and wrote upon it in plain view: "The Bell Claim. Located July 8th, 1892. I claim 1,500 feet in length on this lead, with twenty days for prospecting. [Signed] J. J. Flick." Thereupon, after prospecting along the lead for a while, he went away to look for feed for his horses. Having found none, the following days until the 14th were spent in looking for a camping place where it could be had. He returned to the claim on the 14th in company with one Shaughenessy. They prospected on the claim and in its vicinity on that and the following day. On the 16th, after prospecting over the ground again with Shaughenessy, he proceeded to complete the location by putting up four corner and two end stakes, beginning at the east end center stake. He put up this and the northeast and southeast corners, blazing along the line as he went. He then returned to the discovery, and blazed along through on the outcrop to the west end, where he put up two corner stakes and a center stake, blazing out the lines. The stakes were made by cutting off trees four or five feet from the ground and squaring the stumps, except at the northwest corner, where he found a stump 20 feet high, which he squared as it stood. All of these monuments were marked, "Northeast corner of the Bell claim," "East end center stake of the Bell claim," etc. The distances and directions were estimated; the intention being to locate 100 feet easterly and 1,400 feet westerly from the discovery, and 300 feet on either side. A notice was posted at the discovery, substantially the same as the declaratory statement filed for record. This declaratory statement was subsequently prepared by a notary and left with him for record, but was not recorded until August 2, 1892. A copy of this was introduced in evidence. No objection was made as to its sufficiency in substance and form. It is not

necessary to note it, further than to mention the fact that it contains the statement that said quartz lode was discovered on July 8, 1892. Other evidence tended to establish the good faith of Flick in completing his location; claiming that his right dated from July 8th, the time at which he made his discovery. Defendant Rockefeller was joined as one of the locators when the declaratory statement was made out.

Defendants' contention at the trial was that, Flick having made his discovery and posted his notice upon the ground on the 8th of July, their claim thereto was superior to that of plaintiffs, that this act on the part of Flick withdrew the ground which was claimed in his notice from exploration by others, and that, plaintiffs having made their location within the 20 days during which the ground was not open to location, their location was void, as to the conflicting area, and they acquired no right thereto, notwithstanding defendants failed to make their record within the 20 days. The court entertained a different view of the law, and proceeded upon the theory that, inasmuch as the plaintiffs made their location and recorded their declaration before the defendants did, they acquired a right to the conflicting area, to the exclusion of defendants. We quote the fourth paragraph of the charge, as illustrating the view the court held, and the theory upon which the case was submitted to the jury.

"You are instructed that if you find from the evidence that the defendants discovered the Bell lode or claim on the 8th day of July, 1892, before they had a valid or could have had a valid and subsisting right to said lode or claim, as against any person who had acquired an adverse right thereto, the defendants must have distinctly marked the location on the ground, so that its boundaries could be readily traced, and made and filed in the office of the county clerk and recorder in the county where such claim was situated an affidavit of the location thereof. If the defendants failed to do any one of these things, then, as against the plaintiffs,

if the plaintiffs had made a valid location of the same, or any portion of the same ground, by discovery and location and recording, between the said 8th day of July, 1892, and the 2d day of August, 1892, the plaintiffs' right to the land in controversy would be valid, and a better right, and you will find for the plaintiffs."

Under the court's view of the law, as stated here, the jury could not have found for the defendants, in any event, unless they found Bramlett's location bad; for there is no controversy but that Bramlett finished whatever he did in the way of making his location on the 12th, or that he filed his statement for record on the twentieth day thereafter. And although the defendant Flick made his discovery and posted his notice on the 8th, still this gave him no rights at all, if he did not finish his location within the 20 days, and get his notice on record, no matter what were his intentions, or whether he was acting in good faith or not. The question presented is not without difficulty, but we think the result of the decisions of the courts upon similar controversies logically leads to the conclusion that, if Flick actually posted the notice in plain view upon the exposed lead, as claimed by him, on July 8th, and thereafter during the 20 days intended in good faith to secure his claim by completing his location, no failure on his part to make such a location and proper record within the 20 days would inure to the benefit of plaintiffs. In *Doe* v. *Mining Co.*, 70 Fed. 455 (a similar case, decided in 1895), it was held that the discoverer of a mineral vein should have a reasonable time after his discovery to complete his location; the length of time depending upon the situation of the ground, its character, the means of marking the boundaries, and the abilities of the discoverer to ascertain the course or strike of the vein. The court held this to be the rule in the absence of local rules and regulations fixing the time within which the location might be completed. In this case 20 days were held to

be reasonable. The supreme court of Nevada announces the same rule. *Gleeson* v. *Mining Co.*, 13 Nev. 442.

Wherever there are statutory provisions fixing the time within which, after discovery, the prescribed work necessary to a valid location must be done in order to secure the claim, it is held that the discoverer has the full time provided in the statute to complete it. Lindl. Mines, § 339; *Omar* v. *Soper*, 11 Colo. 380, 18 Pac. 443; *Erhardt* v. *Boaro*, 113 U. S. 527, 5 Sup. Ct. 560; *Marshall* v. *Manufacturing Co.*, 1 S. D. 350, 47 N. W. 290; *Sanders* v. *Noble*, *supra*. Under our statute now in force (Pol. Code 1895, §§3610-3612), at the time of discovery a notice must be posted at the point of discovery, and it is provided therein what this notice shall contain. The statutes of Colorado and South Dakota contain similar provisions. In *Sanders* v. *Noble*, *supra*, following the authorities cited, this court held that, upon the posting of the notice at the discovery in compliance with the provisions of the statute, the prospector not only has the full 90 days in which to do the work necessary, but that in marking his boundaries after the work is done he may also swing his claim so as to make it cover the lead to the extent claimed, to the exclusion of others who have sought in the meantime to occupy ground within the possible limits of the claim. Our statute of 1887, under which the locations involved here were made, contained no provision requiring a notice to be posted, but it allowed 20 days in which to complete the location and make the necessary record. Comp. St. div. 5, § 1477. It therefore seems to be the inevitable conclusion from the authorities that the defendant Flick, if he posted his notice in good faith, in plain view, with the intention to complete his location within the prescribed 20 days, after prospecting sufficiently to enable him to determine the course or strike of the vein, thereby acquired a right to all the ground along the lead legitimately covered by his notice, to the exclusion of any person endeav-

oring to locate any part of it by means of a junior discovery.

Recurring now to the notice posted, the amount claimed is simply 1,500 feet along the lead; nothing being said as to the direction in which this was to be measured. In *Erhardt* v. *Boaro, supra,* a similar notice was considered by the supreme court of the United States. In commenting upon it, Mr. Justice Field said:

"The written notice posted on the stake at the point of discovery * * * declares that they [the locators] claim fifteen hundred feet on the 'lode, vein, or deposit.' It thus informed all persons subsequently seeking to excavate and open the lode or vein that the locators claimed the whole extent along its course which the law permitted them to take. It is, indeed, indefinite, in not stating the number of feet claimed on each side of the discovery point, and must therefore be limited to an equal number on each side; that is to seven hundred and fifty feet on the course of the lode or vein in each direction from that point. To that extent, as a notice of discovery and original location, it is sufficient."

In posting the notice he did upon the lead, we are of the opinion that Flick thereby established a right for the statutory period of 20 days to 1,500 feet along the lead, but that he was limited in this right to 750 feet on either side of the point of discovery. The fact that in making the location thereafter he included within his boundaries ground not legitimately covered by his notice, if this were done in good faith, as the result of ignorance or inadveretence merely, would not invalidate his claim, in so far as it includes what was legitimately covered by the notice. In no event would any error or misprision on his part in endeavoring in good faith to complete his location inure to the benefit of the plaintiffs under their location, made on July 12th, as to any ground covered by it which comes within the limits embraced by Flick's notice. To the extent, then, of 750 feet along the lead easterly and westerly from the discovery on the Bell claim, the ground was not open to exploration during 20 days after July 8th. In so far, therefore, as any of this ground

is covered by the Blacktail claim, the latter should be held invalid, provided Flick's good faith in posting his notice is established by the proof.

The instructions of the court on this branch of the case, as illustrated by the paragraph quoted, were therefore erroneous and prejudicial to the defendants. They are therefore entitled to a new trial upon the lines herein indicated.

We are requested to pass upon the question as to whether the evidence is sufficient in any event to warrant a verdict for plaintiffs. As there must be a new trial, we decline to express any opinion on this point.

Many other questions have been urged upon the attention of the court, but we think enough has been said herein to guide the court below in trying the cause anew.

Let the judgment and order appealed from be reversed, and the cause be remanded, with directions to grant defendants a new trial.

Reversed and remanded.

HUNT and PIGOTT, JJ., concur.

[1]McCARTHY v. SPEED ET AL.

(12 South Dakota 7; 80 N. W. 125. Supreme Court. September 2, 1899.)

Where an appeal is from the judgment and an order denying new trial, made after judgment, but never entered, it will be considered as from the judgment alone.

Patent issued since suit brought. An appeal from a judgment for defendants in an action to determine adverse claims to mining property will not be dismissed because since the appeal, the ground in controversy has been conveyed by defendants, and a patent has been issued to their grantee, who had constructive notice of the action.

[2]Locators cannot impeach their own discovery. The locators of a mining claim and the subsequent grantees of such locators are estopped to deny that there was no discovery to support the location as against parties to whom they convey such title.

On rehearing and motion to dismiss the appeal. Motion to dismiss denied.

CHARLES W. BROWN and MCLAUGHLIN & MCLAUGHLIN, for appellant.

[1]Error to U. S. Supreme Court dismissed because no Federal Question involved. 181 U. S. 269.

[2]A locator is a poor witness to attack his own title. *Jantzen* v. *Arizona Co.* (Ariz.) 20 Pac. 93.

In cross-examination, plaintiff's witnesses, locators, may be cross-examined as to facts destructive of their claim, although the topics were not covered in the direct examination. *Rush* v. *French*, (Ariz.) 25 Pac. 816. On same point see *Anderson* v. *Black*, 70 Cal. 226; 11 Pac. 700.

Declaration of locator before parting with his interest, against validity of location admitted in evidence. *Harrington* v. *Chambers*, 3 Utah 94; 1 Pac. 362. *Rush* v. *French*, (Ariz.) 25 Pac. 816.

But not after he has parted with his interest. *McGinnis* v. *Egbert*, 15 M. R. 329. See *Alhambra Co.* v. *Richardson*, 72 Cal. 598; 14 Pac. 379.

Admission by one of several co-plaintiffs as to antedating loca-

Schrader & Lewis and Fowler, Cull & Whitfield, for respondents.

Haney, J. The issues involved in this action are stated in our former decision. 77 N. W. 590, 19 M. R. 615. Upon the argument on rehearing, respondents moved to dismiss for the following reasons: (1) Because the order denying a new trial was not entered when the appeal was taken; and (2) because since the appeal was taken all the ground in controversy has been conveyed by defendants to a corporation to which a patent has been issued by the United States government. It has been frequently held by this court that where the appeal is from the judgment and an order made after judgment, and the order has never been entered, the case will be considered as an appeal from the judgment alone. *Machine Co.* v. *Woulph*, 11 S. D. 252; 76 N. W. 939. The motion to dismiss for the first reason must be denied, and the record reviewed as if no motion had been made. It must also be denied on the second ground. It is alleged that a notice of pendency of the action was filed in the proper

tion notice, not admissible against co-plaintiff. *Muldoon* v. *Brown*, 20 M. R. 269.

Admissions of grantor against his title are good against his grantee. *McCurtain* v. *Grady*, (Ind. Ter.) 38 S. W. 65. See *Low* v. *Schaffer*, 24 Oreg. 239; 33 Pac. 678.

A prospector is estopped to assert a prior title against one who employed him to locate claims. *Fuller* v. *Harris*, 29 Fed. 814.

Grantor in deed of mining claims estopped from denying that he was in possession or that the claims had been located. *Belcher Co.* v. *Deferrari*, 62 Cal. 160.

Grantor of mining claim cannot assert that he had no valid location. *Blake* v. *Thorne*, (Ariz.) 16 Pac. 270.

Party contracting to convey an interest in claims cannot deny his own title, locate them for, and treat them as, the property of another. *Largey* v. *Bartlett*, 18 Mont. 265; 44 Pac. 962.

The lessee of a mine cannot attack his lessor's location. *Bunker Hill Co.* v. *Pascoe*, 24 Utah 60; 21 M. R. —. *Silver City Co.* v. *Lowry*, 20 M. R. 55.

county. If so, defendants' transferee acquired title with constructive notice of plaintiff's interest in the property. Comp Laws. § 4897. Plaintiff is not seeking to prevent the defendants or their grantee from acquiring title under locations conceded to be valid, but is seeking to establish his right to an interest in the property by virtue of the locations under which defendants claim title. If defendants' successor has obtained the patent with notice of plaintiff's right, a court of equity can decree that plaintiff, as co-tenant of the original locators, has an interest in the property, and that the patentee holds the title in trust for the excluded co-tenant. Plaintiff was not required to adverse the application for patent. *Turner* v. *Sawyer,* 150 U. S. 578; 14 Sup. Ct. 192; *Suessenbach* v. *Bank,* 5 Dak. 477; 41 N. W. 662.

Since the rehearing the questions presented by the merits of the appeal have received careful attention. The views announced in our former opinion are adhered to, with slight modifications rendered necessary by the fact, since disclosed, that the order granting a new trial was not entered, and that the evidence is not properly before us. It is stated in our former decision "that the evidence discloses that plaintiff purchased his interest in the Tin Bar claims for a valuable consideration, after an examination of the records, relying upon the location certificates which were placed upon the public records by the locators for the purpose of selling the property as mining claims." And this: "It is urged in argument of counsel for appellant that the judgment below should be reversed and the cause remanded, with directions to enter judgment for plaintiff. This, we think, should not be done. All the facts upon which we predicate an estoppel are not contained in the findings of fact. This court cannot supply such facts, and without them the decision of the trial court would not sustain a judgment in favor of the plaintiff. The judgment and order denying a new trial are reversed, and a new trial ordered." It now appears that we cannot consider

the evidence, and must base our decision upon the facts found by the court below. Its findings show that Reed, Franklin, Blair, and Eaton recorded a location certificate for Tin Bar No. 1, and that Blair and Eaton recorded a location certificate for Tin Bar No. 2, in the office of the register of deeds in the proper county, before plaintiff purchased his interest in such claims; that neither defendant is in any better position than the original locators, and, whether or not plaintiff examined and relied upon the records, we think defendants are estopped from denying the validity of these locations. It follows that plaintff is entitled to a judgment in his favor upon the facts as found by the trial court. Its judgment is therefore reversed, and the cause remanded, with directions to enter judgment adjudging the plaintiff to be the owner of a one-eighth interest in and to so much of the ground covered by the Holy Terror claim and the Keystone No. 4 claim as is embraced within the boundaries of Tin Bar No. 1 and Tin Bar No. 2, as shown by the circuit court's findings of fact, and for his costs and disbursements in the court below

NORTHMORE v. SIMMONS ET AL.

(97 Federal 886. Circuit Court of Appeals, Ninth Circuit. October 16, 1899.)

Work required by district rule. A district rule requiring a ten foot shaft or tunnel to be sunk or run within 90 days from date of location is valid.

During location year. Work may be required by district rule during the location year.

The amount of annual labor may by district rule be made to exceed $100, but the rule cannot under the act of congress decrease the amount below $100.

Appeal from the Circuit Court of the United States for the Southern District of California.

GARDINER, HARRIS & RODMAN and W. A. HARRIS, for appellant.

GIBBON & HALSTEAD and M. L. HICKS, for respondents.

The text case and *Original Co.* v. *Winthrop Co.*; which it cites, seem to be the only cases which refer to the right of a mining district to increase the amount of annual labor required by the act of 1872.

For the history of mining district organizations and their rules see *Jennison* v. *Kirk*, 4 M. R. 504.

The questions as to what customs are in force when the application is made for patent is one determinable by the land office. *Parley's Park M. Co.* v. *Kerr*, 17 M. R. 201.

District rule fixing $5.00 a day as value of assessment work held void. *Woody* v. *Bernard*, 69 Ark. 579; 65 S. W. 100.

The state statute requiring a certain amount of work to be done on the claim within ninety days from location is not in conflict with the annual labor clause of the mining act of 1872. *Sisson* v. *Sommers*, 19 M. R. 644.

A district rule fixing a certain amount of sinking as the assessment work for the district will not prevent an abandonment if the cost of such sinking amount to less than $100. *Wright* v. *Killian*, 132 Cal. 56; 21 M. R. —

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellant was the complainant in a bill in which he alleged that on January 9, 1897, he made a discovery of mineral-bearing quartz in place in the Mojave mining district, in the state of California, and that he duly located the same; that there was a mining regulation in said mining district which provided that, "within ninety days of location, a shaft shall be sunk or a tunnel run to a depth of not less than ten feet from the apex of the ledge of mineral-bearing quartz; otherwise, the claim shall be subject to relocation;" that upon April 10, 1897, the defendants entered upon the complainant's said claim, and took possession thereof and located the same, contending that the complainant's rights were forfeited by reason of his failure to "comply with the said mining regulation." On a demurrer to the bill for want of equity, the bill was dismissed. The sole question presented upon the appeal is whether the regulation of the Mojave mining district requiring certain work to be done within 90 days after location is valid.

Section 2324 of the Revised Statutes provides:

"The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: * * * On each claim located after the tenth of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year."

The statute was amended on January 22, 1880, so as to read as follows:

"That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim."

Is the regulation of the Mojave mining district above quoted in conflict with the requirement of the statute that work shall be done or improvements made to the extent of $100 upon each claim within one year after the 1st day of January next succeeding the date of the location? It is contended by the appellant that the statute secures to every locator a fixed period of time within which to make the improvements or expend the labor that are or may be prescribed for the preservation of his right, and that by no state statute or mining regulation can the period be abridged. In view of the language of the statute, and the decisions of the supreme court, so far as they afford light upon its meaning, we are of the opinion that section 2324 was intended to prescribe the minimum amount of expenditure in labor or improvements which was exacted by the United States within a maximum period, and to leave to state legislatures or local mining districts the power to make such reasonable regulations as they might deem advisable, within the prescribed limit; such regulations to be always subject to the provision of the statute that at least the expressed yearly amount in work or improvement must be expended upon the claim, and that, at most, the time for expending the same shall not be extended beyond the designated year. This, we think, is clearly implied in the language of the statute. Miners are therein authorized to make regulations governing the "amount of work necessary to hold possession of a mining claim." The amount of work can be regulated only by increasing or diminishing it. The diminution of it is expressly prohibited. There shall be "not less than one hundred dollars' worth" per annum. It follows that the miners may regulate the amount by increasing it. If the amount may be increased above that which is required by the statute of the United States, no reason is perceived why the time may not be abridged within which a portion of it is to be done, or why any other reasonable

regulation may not be required to be complied with within a shorter time than a year. The statute of the United States exacts no discovery shaft, nor any work, as a condition to the location of a claim, or the initiation of the right of a locator. The right of a state legislature to impose such additional work has uniformly been recognized. No difference in principle is discernible between the requirement that such discovery work shall be made as an incident to the location, and the requirement that after location it shall be made as a condition to the subsistence of the same. In either case burdens are imposed upon the locator in addition to the "requirements" of the United States statute. In neither case is the requirement that a shaft be sunk, whether it be denominated a "discovery shaft," or whether it be known by any other name, in conflict with the express provisions of that statute. The statute was not intended to interfere with the rights of the states or of the local mining districts. It was intended to express the most liberal terms on which the United States would part with its right in mining claims. No state legislature nor local mining regulation may grant more favorable terms than those which are demanded by the statute. It contains the full extent of the "requirements" of the United States. There shall be expended upon the claim at least $100 per annum. No limit is placed upon the amount of work above $100 which may by local mining rule be required from the locator. To provide that the assessment work shall be $200 per annum is not in conflict with the statute; neither is there a conflict if one-half of that amount of work be required within one-half of the time. In *Erhardt* v. *Boaro,* 113 U. S. 527, 5 Sup. Ct. 560, the supreme court recognized the validity of a statute of Colorado (Gen. Laws Colo. 1877, p. 630) declaring that one of the essential acts of locating a claim should consist in sinking a discovery shaft upon the lode. Said the court in that case:

"Before 1866, mining claims upon the public lands were held under regulations adopted by the miners themselves in different localities. These regulations were framed with such just regard for the rights of all seekers of the precious metals, and afforded such complete protection, that they soon received the sanction of the local legislatures and tribunals, and when not in conflict with the laws of the United States, or of the state or territory in which the mining ground was situated were appealed to for the protection of miners in their respective claims, and the settlement of their controversies. And although since 1866 congress has to some extent legislated on the subject, prescribing the limits of location and appropriation, and the extent of mining ground which one may thus acquire, miners are still permitted, in their respective districts, to make rules and regulations not in conflict with the laws of the United States, or of the state or territory in which the districts are situated, governing the location, manner of recording, and the amount of work necessary to hold possession of a claim. * * * It does not appear in this case that there were any mining regulations in the vicinity of the Hawk lode which affect in any respect the questions involved here. Had such regulations existed, they should have been proved as facts in the case. We are therefore left entirely to the laws of the United States and the laws of Colorado on the subject."

Section 2320, Rev. St. concedes to mining districts the power to diminish the surface width of mining claims from 300 feet on each side of the middle of the vein to 25 feet on each side thereof. In *Mining Co.* v. *Kerr,* 130 U. S. 256, 9 Sup. Ct. 511, the supreme court through Mr. Justice Field, declared that the effect of such a mining regulation "could not be doubted."

A decision directly in point is that of the supreme court of Nevada in the recent case of *Sissons* v. *Sommers,* 55 Pac. 829, in which the court had under consideration the provisions of the act of the legislature of that state (Laws 1897, p. 103). The first section of the act prescribed the method of locating a mining claim. It declared that it should consist (1) in "defining the boundaries of the claim in the manner hereinafter described," and (2) "posting a notice of such location at the point of discovery." The second section provided that before the expiration of 90 days from the

posting of the notice "the locator must sink a discovery-shaft upon the claim located to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show by such work a lode deposit in place." It was a provision identical with the regulation of the Mojave mining district which is involved in this case, in that it required the act to be done within 90 days after location. The court, in a carefully considered opinion, said:

"We think the legislature may require a reasonable additional amount of work to be done annually, and a reasonable amount of work to complete the location, or, after location, a reasonable additional amount of work within a reasonable time, less than the time named by congress for the annual expenditure, as a condition to the continuance of the right acquired by the location of the mine."

The appellant relies upon *Sweet* v. *Webber,* 7 Colo. 443, 4 Pac. 752, and *Original Co.* v. *Winthrop Co.,* 60 Cal. 631. The first case goes no further than to hold that neither by a rule of miners nor by a state statute can a location be maintained upon the expenditure of less than $100 per annum, as required by the United States statutes,—a proposition that is not disputed and is not involved in this case. The second case holds that a local regulation providing for forfeiture of a claim upon the failure of the locator to perform some work upon it every 60 days was in conflict with the law of congress, and therefore void. The reasoning upon which this conclusion is reached is not stated in the opinion. It is opposed, not only to what we conceive to be the plain meaning of the statute, but to the weight of authority. Certain decisions are also cited, such as *Belk* v. *Meagher,* 3 Mont. 65, which sustain the proposition that a mining claim may not be forfeited until the expiration of the period which congress has fixed for the performance of the annual assessment work, but they are all cases in which the law of the

United States alone was involved. In none of them was there a question of rights under a state law or a miners' regulation, and in none of them was the question which is now before the court even remotely involved. Their inapplicability to the present discussion is too apparent to require further comment. We find no error in the ruling of the circuit court, and the decree will be affirmed.

Ross, Circuit Judge (dissenting). Prior to July 26, 1866, there was no congressional legislation authorizing the location or purchase of any mineral lands of the United States. Up to that time the location, working, and holding of mining claims upon the public lands was governed exclusively by the local rules and regulations of the respective mining districts, and such state legislation as was enacted with respect thereto by the states in which the lands were located. *Jennison* v. *Kirk,* 98 U. S. 453, 457. On the 26th of July, 1866, congress passed an act entitled "An act granting the right of way to ditch and canal owners through the public lands, and for other purposes," the first section of which declares:

"That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts so far as the same may not be in conflict with the laws of the United States." 14 Stat. 253.

That act was followed by that of May 10, 1872 (17 Stat. 91), the fifth section of which enacted, among other things:

"That the miners of each mining district may make rules and regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the fol-

lowing requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the passage of this act, and until a patent shall have been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the passage of this act, ten dollars' worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein until a patent shall have been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made; provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after such failure and before such location."

By an amendment of the latter act made on the 22d day of January, 1880, it was declared:

"That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the 1st day of January succeeding the date of location of such claim." 21 Stat. 61.

It will be thus seen that under the act of May 10, 1872, the time within which the annual work or improvements to the amount of $100 in value was required to be performed or made ran from the date of the location of the claim, which period of commencement was by the act of January 22, 1880, changed to the 1st day of January succeeding the date of location. The purpose of that change was to establish a uniform period for the commencement of such work or the making of such improvements, and was made to correspond with the calendar year. 2 Lindl. Mines, § 626; Barringer & A. Mines & M. p. 263; *McGinnis* v. *Egbert,* 8 Colo. 41, 5

Pac. 652. The exemption of claims from the performance of labor for a portion of a year in some cases was a necessary result of the amendment of January 22, 1880. *McGinnis* v. *Egbert,* supra; *Hall* v. *Hale,* 8 Colo. 351, 8 Pac. 580; 2 Lindl. Mines, § 623; Waite, Am. Min. Law, § 29; Sickles, Min. Dec. p. 393. It has been held that the annual expenditure thus required by the act of congress must be made during the calendar year, and, unless so made, cannot be counted, even if the full amount of work be performed between the date of the location of the mining claim and the beginning of the calendar year succeeding it. Copp. Min. Lands (1880) 295. The reason of this is that congress saw proper to prescribe a uniform time for the performance of the annual assessment work, to the extent of $100 in value, as a condition to the keeping alive of the rights of the locator; and as the property belongs to the government, and is subject to the exclusive control and disposition of congress, its provisions upon the subject are binding and controlling. That all local rules and regulations of any mining district, and all state legislation, in respect to the disposition of the minerals in or upon any of the public lands of the United States, in any way conflicting or inconsistent with the congressional legislation, is invalid, is manifest, not only from the foregoing consideration, but because the statute itself, in effect, so declares, and the authorities so hold. It is safe to say that not one decision can be found to the contrary. *Jennison* v. *Kirk,* 98 U. S. 457; Barringer & A. Mines & M. pp. 267, 282; 1 Lindl. Mines, §§ 310, 626; *Eberle* v. *Carmichael* (N. M.) 42 Pac. 98; *Du Prat* v. *James,* 65 Cal. 555, 557, 4 Pac. 562.

In the case at bar the bill shows that the complainant on the 9th day of January, 1897, discovered a vein of mineral-bearing quartz in place, situate in Mojave mining district, in Kern county, Cal., and that after making such discovery he on the same day located, claimed, and took possession of

1,500 feet in length along said mineral vein of rock in place by 500 feet in width, being 250 feet on each side of the middle of the vein, and did mark the boundaries, erect monuments, and post and record a notice of the location, as required by the laws and by the local rules and regulations of the district, and continued in possession of the claim so located until the 10th day of April, 1897, at which time, it is alleged, the defendants, with knowledge of the complainant's rights, but disregarding them, entered upon the premises and dispossessed the complainant; basing their action upon the ground that the complainant had forfeited his rights to the premises by failing to comply with the requirements of a rule of the mining district within which the claim is situated, which declares that:

"Within ninety days of location a shaft shall be sunk or a tunnel run to a depth of not less than ten (10) feet from the apex of the ledge of mineral-bearing quartz; otherwise, the claim shall be subject to relocation."

The validity of this local rule is the sole question in the case. It is conceded in the opinion of the majority of this court that a similar rule was held invalid by the supreme court of California in the case of *Original Co.* v. *Winthrop M. Co.*, 60 Cal. 631; but the prevailing opinion disapproves that decision, and declares it to be not only contrary to "the plain meaning of the statute [of the United States], but to the weight of authority." In my judgment, the exact reverse is true. The decision of the supreme court of California thus criticised and disapproved gives force and effect to the federal statute, and holds invalid a local rule of a mining district inconsistent therewith. This is not only in accord with the express language of the United States statute itself, and with the text writers, but with every decision of the courts that has come under my observation. Not a single decision cited and relied upon in the prevailing opinion, in

my judgment, at all supports the conclusion therein announced; and with the exception of some dicta taken from the latter portion of the opinion of the supreme court of Nevada in the case of *Sissons* v. *Sommers,* 55 Pac. 829, there is nothing in the language of any of them that gives any support to the conclusion reached by the majority of this court. The federal statute, as has been shown, fixes the 1st day of January succeeding the date of the location as the commencement of the year within which the required work shall be done. The location here in question having been made on the 9th day of January, 1897, the time thus fixed by the legislation of congress within which the locator was required to perform at least $100 worth of work or make $100 worth of improvements commenced on the 1st day of January, 1898, and extended for the period of one year. Yet the local rule of the mining district in question declares forfeited the rights of the locator unless within 90 days after making his location a shaft be sunk or a tunnel run to a depth of not less than 10 feet from the apex of the ledge of mineral-bearing quartz; and this forfeiture the defendants to the present suit asserted, and it is now sustained by this court. Thus, by a local rule of the mining district, the locator's rights to the claim that he located in all respects in accordance with the law is declared forfeited before the commencement of the period fixed by the act of congress within which the annual assessment work is required to be done. It is difficult to see how there could be any greater inconsistency between two rules than is here shown. That there can be no forfeiture of a locator's rights to a claim properly located until the expiration of the full time allowed by the United States statute for the doing of the annual work or the making of the annual improvements has been many times decided. *Belk* v. *Meagher,* 3 Mont. 65, affirmed in 104 U. S. 279; *Original Co.* v. *Winthrop M. Co.,* 60 Cal. 631; *Mills* v. *Fletcher,* 100 Cal. 142, 34 Pac. 637; *McGinnis* v. *Egbert,* 8 Colo. 41, 5 Pac.

652; *Hall* v. *Hale*, 8 Colo. 351, 8 Pac. 580; *Atkins* v. *Hendree*, 1 Idaho, 95; *Mining Co.* v. *Perasich*, 7 Sawy. 217, 7 Fed. 331; Barringer & A. Mines & M. pp. 264, 267, 282; 2 Lindl. Mines, p. 777, § 624. Yet the majority of this court holds that this can be done by a local rule of the mining district within which the claim is situated. Nothing can be plainer, in my opinion, than that the time fixed by congress for the performance of the work and improvements it requires cannot be taken away, shortened, or in any way modified by any state legislation, or by any local rule or regulation of a mining district. To the extent that congress legislates on the subject, its act is binding and controlling. The acts of congress, however, in express terms authorize state legislation and the making of local rules and regulations by the various mining districts not inconsistent with its own act. For example, congress not having declared what should constitute a "discovery" of a mineral-bearing vein or lode, or the character or extent of the work necessary to be done to disclose such vein or lode in place, it is entirely competent for the states to legislate upon that subject, and for the various mining districts to make rules and regulations in respect thereto not inconsistent with federal or state law. Many of them have done so; and as pointed out in 1 Lindl. Mines, p. 447 et seq., these state acts have almost always, if not universally, been sustained, because not inconsistent with any of the provisions of the acts of congress on the subject. In *Wight* v. *Tabor*, 2 Land Dec. 738, 742, 743, however, Secretary Teller expressed a doubt whether a state legislature has the right to attach this condition to the appropriation of mineral lands. The first state act of that character was that of Colorado. Mills' Ann. St. 3152, 3154, 3155. In all vein and lode locations, discovery of mineral-bearing rock in place is the source of title. Without it there can be no valid location. *Book* v. *Mining Co.* (C. C.) 58 Fed. 106, 120. In 1 Lindl. Mines, § 343, will be found a synopsis of the

legislation of Colorado, Arizona, Idaho, Montana, New Mexico, Wyoming, and North and South Dakota, requiring certain development work as a prerequisite to the completion of a valid location. The state of Nevada has since passed a similar act, which was the subject of consideration by the supreme court of Nevada in *Sissons* v. *Sommers,* 55 Pac. 829. The object of such legislation, says Mr. Lindley (section 344), is twofold:

"(1) To demonstrate to a reasonable degree of certainty that the deposit sought to be located as a lode is in fact a vein of quartz or other rock in place; (2) to compel the discoverer to manifest his intention to claim the ground in good faith under the mining laws."

The discovery shaft and the various equivalents provided for by the several state enactments constitute a part of the process of location (Morr. Min. Rights [8th Ed.] p. 27; 1 Lindl. Mines, *supra*), and, being consistent with the acts of congress, are valid, for the reason already stated. It was such an act that was the subject of consideration in *Erhardt* v. *Boaro,* 113 U. S. 527, 5 Sup. Ct. 560. In the other case cited in the prevailing opinion from the supreme court of the United States,—that of *Mining Co.* v. *Kerr,* 130 U. S. 256, 9 Sup. Ct. 511,—the local mining rule under which the location was made, and about which the court was speaking in the quotation made, was adopted prior to any congressional legislation upon the subject.

In California there is no statute, nor was there any rule or regulation of the Mojave mining district requiring any development work prior to, and as a condition of, a valid location. The bill in the present case shows that the complainant perfected his location. The annual work necessary to maintain and hold that location is an altogether different thing. This distinction is recognized and clearly pointed out by Mr. Lindley in sections 623 and 626, and the failure to observe it constitutes, in my judgment, the error in the opinion

and judgment from which I dissent. The performance of this annual assessment work is called by the miners a "representation" of the mine, and, when performed for a given period, the mine is said to be "represented." *Belk* v. *Meagher,* 3 Mont. 65, 77; 2 Lindl. Mines, p. 775; Barringer & A. Mines & M., *supra.* Congress having legislated in respect to that annual assessment work, its provisions are paramount, and any and everything that conflicts with them is void, be it a rule or regulation of a mining district or a statute of a state. For the reasons here given, I respectfully dissent from the opinion and judgment of the majority of the court.

SAMUEL MCINTYRE v. THE AJAX MINING CO.

(20 Utah 323; 60 Pac. 552. Supreme Court. October 16, 1899.)

Nonsuit confined to causes stated in motion. A party moving for a nonsuit should specifically state the grounds upon which he bases his motion, and thereby call the court's attention and that of the opposite party to the point on which he relies, for an appellate court will not sustain a motion for a nonsuit, except on the grounds alleged in the motion.

[1]**Contract to pay out of ore proceeds may become absolute.** Where it is provided in a contract "that certain sums named shall be paid the defendant mining company *pro rata* out of the proceeds of ore sales, compromises, or otherwise," and immediately thereafter it is provided that no other money shall be paid out, except for necessary operations, until after the payment of the sums mentioned, the proper construction of the terms mentioned is that, if the net proceeds of ore sales, and those derived from compromises, did not, within a reasonable time, amount to a sum sufficient to liquidate said amounts, the obligation to pay was to become absolute, and not dependent upon either the proceeds of ore sales or compromises.

Reasonable time to find proceeds of ore. In the absence of any showing as to the facilities of the defendant corporation to produce ore from ore sales, compromises, or otherwise the sums of $34,000, specified in the contract, 27 months is not an unreasonable time in which to delay payment of said sums, and the time between the filing of the complaint and the trial cannot be taken into consideration in determining whether a reasonable time has elapsed, because it forms no part of plaintiff's cause of action, as set out in the complaint. A promise to extend the time of performing a contract is not binding unless made upon some new consideration.

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[1]*Downing* v. *Rademacher*, (Cal.), 62 Pac. 1055.

Complaint upheld as sufficient in action on contract payable out of proceeds of sale or working. *Abby* v. *Dexter*, 18 Colo. App. 498; 72 Pac. 892.

A covenant to pay out of proceeds of lease is not necessarily broken by cesser of work or by assignment. *Caley* v. *Portland*, 18 Colo. App. 390; 22 M. R. —.

To pay $2,000 "if sale within one year," construed to be an absolute promise to pay at the end of the year. *Johnston* v. *Schenck*, 15 Utah 490; 50 Pac. 921.

To establish a prima facie case, the evidence must show the existence of facts which, either alone or aided by other facts presumed to exist from those established by the evidence, warrant a recovery, if not overcome by counter evidence.

Negative facts known to adverse party. Where the plaintiff grounds his right of action on negative allegations, the negative averments which lie peculiarly within the knowledge of the opposing party are taken as true, unless disproved by that party.

Where the plaintiff's cause of action is not based upon any negative allegations, but the facts which he is required to prove are all affirmative, before the burden of proof can be shifted from the plaintiff he must make a prima facie case.

(Syllabus by the Court.)

Appeal from District Court, Salt Lake County; Ogden Hiles, Judge.

Action by Samuel McIntyre against the Ajax Mining Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Brown & Henderson, P. J. Daly, and Moyle, Zane & Costigan, for appellant.

King, Burton & King, Dey & Street, and Powers, Straup & Lippman, for respondent.

Where a contract for the sale of a quarry provides that the agreement shall become null in case of no profit in working, the agreement is valid and the purchase money not recoverable. *Krum* v. *Mersher*, 15 M. R. 415.

A buyer on conditional sale, the terms of which he has not complied with, cannot recover in trover the value of improvements placed on the property by him; nor recover at all if in default as to the payments. *Moorhead* v. *Scofield*, 111 Pa. 584; 5 Atl. 732.

Grantee took a deed for three-fourths interest giving note for balance unpaid. Grantor really owned only one-half. *Held*, in suit on note defendant could not give parol evidence of promise to secure title to the other one-fourth. *Zimpelman* v. *Hipwell*, 54 Fed. 848.

Working mine is good consideration for agreement of sale. *Clarno* v. *Grayson*, 30 Oreg. 111; 46 Pac. 426.

BASKIN, J. The plaintiff, who is the appellant, in his complaint alleges, as a second cause of action, that "on February 1, 1895, one Frank Salisbury sold and conveyed to defendant an undivided half interest in the Champlain No. 2 and Fraction mining claims for the sum of $17,000, which sum defendant agreed to pay Salisbury; that on May 1, 1895, for a valuable consideration, Salisbury sold and assigned his said claim for said amount to one H. M. Ryan; that on or about September 6, 1895, Ryan, for a valuable consideration, sold and transferred to plaintiff $6.010 of the said $17,000 claim, and defendant was immediately informed of the assignment and transfer, and accepted the same, and promised and agreed to pay it."

The answer "admits that Salisbury sold and attempted to convey the property mentioned, and promised to give a perfect title, but failed to carry out said agreement, and to convey the property so agreed. Denies that the defendant agreed to pay Salisbury $17,000, or any amount, but admits that it promised to pay him on condition that the title to said property was clear and free from all incumbrances; that the title was perfect, and that no suit or controversy affected it; and also that said amount, nor any part of it, should be paid until certain debts and obligations, aggregating a large amount, should be paid off and discharged,—which said conditions, it alleges, have not been complied with. Admits that Ryan sold and assigned $6,010 of the claim, but alleges that in the

In an action on a written contract, whereby defendant who held a mine under bond and lease, agreed to pay at a certain rate for development work done on the mine by plaintiff (the owner), parol evidence is admissible to show that the agreement was subject to the understanding that it should not become binding unless defendant sold the mine and received payment. *Hurlburt* v. *Dusenbery*, 26 Colo. 240; 57 Pac. 860.

Mines sold to be paid for out of proceeds only. Original vendor permits vendee to sell again, second vendee assuming the balance due: *Held* good consideration. *Carter* v. *Rhodes*, 135 Cal. 46; 21 M. R. —.

transaction McIntyre acted as the agent of the defendant, and holds the said claim in behalf of the defendant.

The answer further alleges that certain misrepresentations were made by said Salisbury with reference to the property, upon which defendant relied. Also alleges that certain expenses incurred in attempting to perfect title would have to be first deducted from the amount due; that plaintiff was fully aware of the outstanding claims prior to the purchase, and knew that, before any sum or amount could be paid, various sums, aggregating $60,000, would have to be first paid by the defendant; that these claims have not been paid, but a large portion of them is due, and defendant is as yet unable to pay and discharge them; that there is a contract, which was known to the plaintiff, by the terms of which $5,000 of the said $17,000 was to be preferred over and above the remaining $12,000, and the said $5,000 was to bear interest at the rate of 8 per cent., and the remaining $12,000 to be treated as security for the payment of the said $5,000 so preferred, together with interest; that the interest was to be deducted from the $12,000, and that, before the claim of plaintiff should be paid, it would be subject to the interest thus advanced paid upon the said $5,000, and would not be due in any event until the $5,000 was first paid and discharged."

At the close of plaintiff's testimony the defendant moved for a non-suit upon the following grounds:

"First. That the evidence shows that the claim was not to be paid until it was paid out of the proceeds from sales of ore from the Ajax Mining Company's property, and it has not been shown that any profits have been derived whatsoever from sales of ore out of the Ajax Mining Company's property.

"Second. That the claim was not to be paid until other claims, aggregating a large sum, had been paid; and that it is not shown that these claims have been paid.

"Third. That the claim was expressly made subject to the prior payment to Frank Salisbury of $5,000, and interest thereon at the rate of 8 per cent. per annum, out of the first moneys that became due on the total claim of $17,000, as shown by the minutes of May 6, 1895, and it is not shown that Salisbury has ever received his $5,000.

"Fourth. It is shown by the evidence that this was a secondary claim, provided for in a certain trust deed; that these claims had been protected by reason of assessment that the stockholders had been compelled to pay. A motion, seconded by the plaintiff, was carried, reciting that the stockholders had been compelled to pay large sums for the purpose of protecting this claim, and that the amount so paid by them pursuant to assessment so levied should be refunded before payments were made to the holders of said secondary claims; and that the trust deed states expressly that this was a secondary claim, and amongst the last group of claims that were to be recognized in said trust deed; and it is not shown that these assessments have been refunded. Mr. McIntyre is bound absolutely by this resolution, which he seconded himself, and which was the action of the corporation and of the directors, and in the faith of which the assessments were paid." The motion, so far as it relates to the second cause of action, was sustained, and an order was entered dismissing the same. From this order the plaintiff appealed.

In support of the order, the respondent insists that the allegations of the complaint hereinbefore mentioned "set forth an express agreement to pay the sum sued for, and that the evidence conclusively establishes a conditional promise to pay when certain defined precedent conditions were fulfilled."

The evidence shows that the said Frank Salisbury and certain other parties, being desirous of forming a corporation for the purpose of working certain mining claims, among which was the said Champlain No. 2, on the 7th of June,

1894, entered into a contract in which it was agreed that a corporation should be formed for said purpose, and that the owners of said mining claims should share in the capital stock in certain proportions therein named, and that certain interests which the said Salisbury and Peter C. Burke, who were parties to said contract, had in the said Champlain No. 2, conveyed by them to one John T. Sullivan, in trust for the corporation when formed, should, immediately upon the creation of such corporation, be conveyed to it by the said Sullivan, and that there should be paid to the said Salisbury and Burke $34,000, and to one W. I. Snyder the amount which he should thereafter pay in certain litigation, including $2,000 to W. H. Dickson and $1,000 to an expert; said payments to be made pro rata out of the proceeds of ore sales, compromises, or otherwise; and that "the sum of $5,000 shall be paid to Salisbury, or his assigns, first of all. All of which are to be paid out and made good before any general dividend shall be paid out, or any other money, except for necessary operations."

In pursuance of said agreement, the defendant corporation was formed, and the said Sullivan conveyed the interest in the Champlain No. 2, held by him in trust, to the defendant. Plaintiff's demand is for that portion of said sum of $34,000 assigned to him.

Whether the action is one of special assumpsit or one of general assumpsit, in either case the claim of the plaintiff is subject to the terms and conditions of said contract, and in either case the evidence to sustain the plaintiff's claim must be the same.

If, as claimed by the respondent, the action is on an express contract, then the evidence discloses a material variance, which would have been fatal had the respondent made this variance a ground in the motion for a nonsuit. This was not done. The substance of the several grounds of the motion is that the evidence conclusively shows that at the

time the suit was brought the conditions precedent to the maturity of plaintiff's claim had not occurred. Or, in other words, the evidence conclusively showed that the plaintiff's claim is not yet due.

In the case of *Frank* v. *Mining Co.*, 56 Pac. 421, this court said: "We are of the opinion, and so hold, that a party moving for a nonsuit ought to be required to specifically state the grounds upon which he bases his motion, and thereby call the court's attention and that of the opposite party to the point on which he relies."

The doctrine so announced is supported by the authorities cited in said opinion.

In the case of *Palmer* v. *Publishing Co.*, 90 Cal. 168, 27 Pac. 21, it is held that: "It is error for the trial court to grant a nonsuit unless the grounds therefor are called to the attention of the trial judge and the plaintiff at the time the motion is made; and, where none of the grounds upon which the nonsuit is asked are sufficient to warrant the court in granting the motion, the order granting it will be reversed, although another ground, not specified in the motion, might have warranted the order."

An appellate court will not sustain a motion for a nonsuit except on the grounds alleged in the motion. In view of the fact that the trial court, had objection, on account of variance, been made a ground in the motion for nonsuit, might, and probably would, have, on motion, permitted the complaint to be amended so as to conform to the evidence, unless the defendant had shown that it would have been injured thereby, the question (so elaborately discussed in the briefs of counsel) whether, as claimed by respondent, the plaintiff's action is one of special assumpsit on an express contract, or, as claimed by appellant, is one of general assumpsit on the common count, is not material.

It is necessary to look further into the evidence in order to determine what the defendant's obligations are under the

contract established thereby. The defendant was not a party to the contract of June 7, 1894. At that date it had no corporate existence. Its liability accrued after its formation, not by virtue of any expressed contract made with Salisbury and Burke, but by virtue of the conveyance to it by Sullivan of the property held by him in trust. When the defendant accepted this conveyance, there was formed, by implication of law, an implied contract, whereby the defendant immediately became obligated to pay to Salisbury and Burke, in accordance with the terms of the contract of June 7, 1894, the consideration of said conveyance, which was the said sum of $34,000. The obligation of the defendant to pay said sum, as provided in said contract, after the defendant company was incorporated, was specifically acknowledged in a number of resolutions passed by the board of directors; and after the assignment to the plaintiff the portion of said sum assigned to him was entered to the credit of the plaintiff in the books of the company.

It is claimed, however, by respondent, that said contract was expressly modified so as to subordinate the plaintiff's claim to a number of others, besides Salisbury's preferred claim of $5,000, amounting to a large sum.

The evidence in support of this alleged modification consists of certain resolutions passed by defendant's board of directors, among which are the following, which fully illustrate all that was accomplished by said resolutions: On the 6th day of May, 1895, the following resolution was passed:

"Whereas, the following claims are just, and are recognized claims against this company, viz.: Josiah Barnett, trustee, and W. I. Snyder, on purchase money; Burke and Salisbury; Snyder and Shields; Ryan; Knox; McIntyre,—and it is agreed that the same are to be paid in the following order: (1) Barnett, trustee, and subrogated claims balance purchase money; (2) to McIntyre, as per contract; (3) Snyder, $5,500; (4) Salisbury, or assigns, $5,000; (5) Burke and Salisbury, or assigns, $29,000; Snyder and Shields, $19,635; Ryan and Knox, $6,030, pro rata; (6) McIntyre for water right, etc."

None of the claims mentioned in said resolution, except that of Salisbury and Burke, which, after deducting the preferred claim of Salisbury ($5,000), amounted to said sum of $29,000, had any relation to the claim of plaintiff, but the latter included the plaintiff's claim in this action.

It does not appear from the evidence that either Salisbury or Burke ever gave consent to the change mentioned in said resolution, or received any consideration, or did anything, which would make said resolution binding on them. The resolution was simply a declaration that the defendant intended to prefer, in violation of its said implied contract, certain claims not embraced therein, and had no legal effect whatever on plaintiff's claim, except that it was a recognition of the validity of the same. In fact, its validity is not now disputed. The only claim of respondent is that it is not yet due and payable.

At a stockholders' meeting of said defendant held July 20, 1895, among other resolutions passed, and which was voted for by the plaintiff, who was then a stockholder, was the following:

"That the board of directors be authorized and directed to enter into the following contract and trust deed as per the resolution heretofore adopted by said board of directors."

The proposed contract and trust deed referred to in said resolution was set out therein, and in terms conveyed to Frank Knox and Samuel McIntyre (the plaintiff), trustees, six mining claims, among which was the Champlain No. 2—

"Together with all the franchises, buildings and appurtenances thereunto belonging and in any wise appertaining. Also the water right heretofore acquired by said company from Samuel McIntyre was assigned and set over unto said Knox and McIntyre, trustees, as aforesaid, and all of the net proceeds and output of said mining property, after paying the actual running expenses, only to and for the following uses and purposes, that is to say: The said trustees were to leave the said Ajax Mining Company and its manager in posses-

sion and operation of said mining claims so long as it complies with the terms of this agreement, and shall receive from said mining company monthly an account of all ore sales and expenditures, and shall exact and receive the net proceeds and apply them as follows, to wit:

First, All unpaid balances due to said Josiah Barnett, trustee, or his assigns, shall be paid and discharged.

Second, All sums of money paid by members of the Ajax Mining Company on account of said debt due Josiah Barnett, trustee, including said $2,066 due said Frank Knox and said $4,000 due said Samuel McIntyre.

Third, Said $5,500 due said Snyder.

Fourth, Said $5,000 or the unpaid portion thereof, due said Frank Salisbury.

Fifth, Said sum of $6,033, due said Frank Knox and Henry M. Ryan for advances as aforesaid.

Sixth, The balance of said $29,000 due to Burke and Salisbury, or their assigns; as also said $19,635 due W. I. Snyder."

This proposed contract was never entered into, or the trust deed ever executed, and the resolution authorizing the same was afterwards rescinded.

The foregoing action did not in any way change defendant's liability under its said implied contract, and cuts no figure in the case, except as a recognition of plaintiff's claim, although much is said in the briefs regarding its effect.

At a meeting of the board of directors held January 22, 1896, and after the assignment to plaintiff of his claim, H. M. Ryan, a director, moved "that, inasmuch as an assessment had been levied in order to pay the pressing obligations of the company, by reason of which the secondary claims against the company provided for in the trust deed directed heretofore to be executed to Knox and McIntyre as trustees had been protected, and that the stockholders had been compelled to pay large sums for this purpose, that the amounts so paid by them pursuant to assessments so levied be refunded before payments were made to the holders of said secondary claims."

The plaintiff, as witness, in his cross-examination, testified as follows: "I believe I seconded that resolution. All that

were there voted 'aye.' I assented to the resolution, and understood the purport of it. Salisbury's claim was a secondary claim, and I claimed to own this $6,010 at the time this resolution was passed." The resolution relating to the contract and trust deed, before mentioned, had not been rescinded at the time plaintiff seconded the motion of Ryan, and the plaintiff had ceased to be an officer of the company before the date of said rescission. The only effect of said resolution, if it had any binding force, was to postpone the time of the performance of defendant's implied contract until after the large amounts paid on assessments by the stockholders should be refunded.

"A promise to extend the time of performing a contract will not be binding unless made upon some new consideration." *Stryker* v. *Vanderbilt,* 27 N. J. Law, 68; *Babcock* v. *Kuntzsch,* 32 N. Y. Supp. 663, 85 Hun, 616; *Gibson* v. *Irby,* 17 Tex. 173; *Parmelee* v. *Thompson,* 45 N. Y. 58; Bish. Cont. (1st Ed.) § 421; Beach, Mod. Cont. § 168.

It does not appear from the evidence that any of the parties interested in said implied contract, except plaintiff, assented to said resolution, or are in any manner bound thereby. The plaintiff received no money consideration. Nothing beneficial to the plaintiff or detrimental or beneficial to the defendant passed in the transaction, and, therefore, if by the action of the plaintiff in seconding and voting for said resolution he promised to extend the time of payment, the same was void for want of consideration. It is clear from the evidence that the defendant parted with nothing, and that it was under no legal obligation to refund to the stockholders the amounts paid on said assessments. It appears from the statement of said motion that the stockholders had already paid said assessments, and it does not appear that they did so on the condition that the sums so paid should be refunded, or that at or before the time said motion was carried by the board of directors any request was made by the stockholders

for the repayment of said assessments. Again, said resolutions violated the rights of the parties in said implied contract who in no way participated in the proceedings of the board.

We are clearly of the opinion that said resolution did not modify said implied contract, or affect the rights of the plaintiff thereunder. Nor do we think that any evidence was introduced showing any modification of the same. As the obligees of said implied contract have, on their part, paid, and the defendant has received, the full consideration of said contract, and nothing further remains to be done by the former, if the defendant has failed to perform its obligations under the contract in any material particular, and the evidence shows, prima facie, that fact, then the nonsuit was improperly granted; otherwise, it was not. To understand the full bearing of the testimony, it is necessary to construe the terms, "that said two sums shall be paid pro rata out of the proceeds of ore sales, compromises, or otherwise," as used in the contract of June 7, 1894. Following these terms, it is provided that no other money shall be paid out, except for necessary operations, until after the payment of the sums mentioned in said contract.

From this provision it is clear that the term "proceeds of ore sales" was intended to include only the proceeds left after paying the expenses of necessary operations; or, in other words, the net proceeds. It is clear that the parties did not intend that payment was to be immediately made, or should depend exclusively on the proceeds of ore sales and compromises, or that said claims should become due and payable only when sufficient funds to pay said claims should be received from the proceeds of ore sales or compromises, because, if such had been the intention, the term "or otherwise" would not have been used.

The proper construction of these terms is that, if the net proceeds of ore sales and those derived from compromises did

not, within a reasonable time, amount to a sum sufficient to liquidate said claims, then payment was to be made otherwise; which means that, after a lapse of a reasonable time, the obligation to pay was to become absolute, and not dependent upon either the proceeds of ore sales or compromises. Bearing upon this question, see cases cited in *Johnston* v. *Schenck*, 15 Utah, 490, 50 Pac. 921. It is implied from said terms that the net proceeds of the sale of ore and compromises should not be used except in payment of said claims.

It is claimed by appellant that a reasonable time in which to pay these claims mentioned in the contract of June 7, 1894, from the proceeds of sales of ore or compromises has expired. The evidence shows that the conveyance by Sullivan, trustee, to the defendant, was made on the 22d of October, 1894. This suit was brought on the 15th day of January, 1897. Considering the amount to be thus raised, in the absence of evidence showing other circumstances,—such as the state of development and the ore-producing capacity of defendant's mines at the date of the incorporation, the grade of the ore, the distance from the market, facilities for working, etc.,—the lapse of time between the date of said conveyance and the institution of suit is not sufficient to establish the fact claimed by appellant.

The time which elapsed between the filing of the complaint and the trial cannot be considered, because it constitutes no part of the plaintiff's cause of action as set out in the complaint, and could not be set out in a supplemental complaint. *Wittenbrock* v. *Bittmer*, 57 Cal. 12.

It is further claimed by the appellant that a prima facie case is made by the evidence. To make such a case, the evidence must show the existence of facts which, either alone or aided by other facts presumed to exist from those established by the evidence, warrant a recovery, if not overcome by counter evidence.

It was shown from the books of the defendant that "on January 31, 1896, there was an overdraft amounting to $356.43; on February 29th, the balance cash on hand was $6,054.47; March 31st, $7,855.44; June 30th, $4,654.40; July 31st, $4,074.86; August 31st, $3,146.40; September 30th, $8,259.57; October 31st, $11,728.29; November 30th, $24,547.02; December 31st, $12,330.40; January 31st, 1897 (the month the suit was brought), $14,995.35. The account also shows that the receipts of the company from ores sold between January 1, 1896, and January 31, 1897, was $113,-244.09."

The appellant claims that this evidence made out a prima facie case of ability upon the part of defendant to meet plaintiff's claim. The evidence also showed that, besides the claims mentioned in the contract of June 7, 1894, the defendant owed other claims which, as stated in plaintiff's brief, amounted to over $50,000; also that an assessment for a large sum, for the purpose of paying pressing obligations of the defendant, had been levied and paid by the stockholders.

From the foregoing facts no presumption of law arises, and, standing alone, they do not show that either said balances represented profits from ore sales or the proceeds of compromises, nor do said gross proceeds of ore sales show that any profits were derived therefrom; and therefore, unless from the foregoing facts the further fact that said balances and gross products of ore sales represent profits sufficient to liquidate the claims mentioned in the contract of June 7, 1894, can be logically presumed, a prima facie case is not thereby made.

In Whart. Ev. (3d Ed.) § 1226, it is stated that: "A presumption of fact is a logical argument from a fact to a fact; or, as the distinction is sometimes put, it is an argument which infers a fact otherwise doubtful from a fact

which is proved. Hence, a presumption of fact, to be valid, must rest on a fact in proof."

Bouv. Law Dict. (Rawle's Rev.) defines presumptions of fact to be "inferences as to the existence of some fact drawn from the existence of some other fact; inferences which common sense draws from circumstances usually occurring in such cases."

Tested by these definitions, is it either a common-sense or logical deduction from the facts proven that said balances and gross proceeds of ore sales included any profits? We do not think so.

The contract of June 7, 1894, provides that the expenses of operations should be paid, and it is, therefore, impossible logically to infer that there were any profits after such expenses are paid, or that it was not necessary to expend said balances in the payment of the expenses. Nor can it be presumed that the sums which the evidence shows were expended in payment of outside claims were not money raised by assessment from the stockholders for that purpose. A claim against defendant in favor of Snyder and Shields, which was of equal rank with plaintiff's claim, was paid part in money and part by a conveyance by defendant of the Cobb tunnel, and eight acres at the mouth of same; but it does not appear from the evidence that the money paid was from the proceeds of defendant's mines, or was not paid out of the money raised by assessments; nor does it appear that the conveyance of said property in any way diminished the products of said mines. We do not think that a prima facie case was made by the evidence.

It is also claimed by appellant that: "The defendant knew, or is presumed to know, what those necessary expenditures were. The facts were peculiarly within its knowledge. The lower court should have held that, in the absence of proof upon the part of the defendant, it might be fairly inferred that these large receipts had not been eaten up by

necessary expenses, particularly when the treasury of the company was shown to be in a flourishing condition, and moneys were shown to have been used for other purposes."

The plaintiff's cause of action does not depend upon any negative propositions, but the facts which he is required to prove in order to sustain his right to recover are all affirmative. In such cases the rule is that, before the burden of proof can be shifted from the plaintiff to the opposing party, a prima facie case must be made by plaintiff; but, when this is done, it devolves upon the defendant by counter evidence to refute the case thus made. The doctrine invoked by appellant's counsel applies only where the plaintiff grounds his right of action upon negative allegations, in which case the negative averments which lie peculiarly within the knowledge of the opposing party are taken as true, unless disproved by that party. *Stillwell* v. *Association,* 19 Utah 257; 57 Pac. 14; Greenl. Ev. §§ 78, 79.

We are of the opinion that the nonsuit was properly granted.

It is ordered that the judgment of the court below be affirmed, but without prejudice to any further action, and that the appellant pay the costs.

Bartch, C. J., and Miner, J., concur.

FRANK MADDEN, (DEFENDANT) APPELLANT.
AND
CHARLES CONNELL, (PLAINTIFF) RESPONDENT.

(30 Canada Supreme Court 109. On Appeal from the Supreme Court of British Columbia. October 24, 1899.)

[1]Discovery shaft on foreign ground. If the initial post of a mining claim is in the United States territory the claim is utterly void.

Appeal from a decision of the Supreme Court of British Columbia affirming the judgment at the trial in favor of the plaintiff, 6 B. C. Rep. 531.

The parties are respectively locators of mineral claims in the West Kootenay District, B. C., which overlap, and the action was brought to determine the title to the ground covered by each claim.

The defendant was the first locator, but it was proved and conceded that the initial post of his claim was south of the boundary between British Columbia and the United States and so within the territory of the latter. The courts below held that this made the location invalid.

[1]Although the decision of a foreign jurisdiction, the text is on the same lines as *Gwillim* v. *Donnellan*, 15 M. R. 482, the leading and controlling case that the loss of the discovery shaft is the loss of the claim.

Discovery within the lines is not enough where there is no vein in the discovery shaft. *McMillen* v. *Ferrum Co.*, — Colo. —; 74 Pac. 461.

Inclusion of discovery shaft in a prior claim held not fatal where there was mineral discovery elsewhere on clear ground and that where the owners of the conflict resurveyed to clear the discovery shaft, it was a matter between themselves only and the fact of the loss of the discovery shaft of no avail to a third claim. *Tonopah Co.* v. *Tonopah Co.*, 125 Fed. 408.

Present: SIR HENRY STRONG, C. J., and TASCHEREAU, GWYNNE, SEDGEWICK and KING, JJ.

ROBINSON, Q. C., for the appellant.

A. F. MAY, for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE (Oral).—We are all of opinion that it is impossible to get over the fact that the initial post on appellant's claim was south of the boundary. Two courts in British Columbia have so decided, which alone would be sufficient, but beyond that the fact is not only clear on the evidence, but is conceded by the appellant. The necessary consequence is that his claim is utterly void. As Mr. Justice Martin says, in giving judgment for the Supreme Court of British Columbia, the position is the same as if there had never been such a claim.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: JOHN STILLWELL CLUTE, JR.

Solicitor for the respondent: P. MCLAREN FORIN.

CECILIA CASSELL v. W. B. CROTHERS.

(193 Pennsylvania 359; 44 Atl. 446. Supreme Court, October 30, 1899.)

[1]**Lease as long as oil is found in paying quantities.** A lease of land on royalty for a fixed term and "as long thereafter as oil is found in paying quantities" becomes on expiration of the fixed term a lease at will determinable by either party, as soon as oil ceases to be produced in paying quantities.

A tenant under such lease shut down with the intention of shortly resuming: Held, that "the moment" she failed to produce oil in paying quantities she became a tenant at will.

Removal of fixtures. A tenant forfeiting a lease has a reasonable time to remove fixtures.

Form of action for conversion of fixtures. Where a lessor has reentered for the purpose of determining a tenancy at will he has no right to seize and convert the fixtures belonging to the tenant who has a reasonable time to remove them. The tenant, however, can have no relief in ejectment but must sue for the conversion.

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[1]It is paying if it pays to work though it may never repay its original cost. *Young* v. *Forest Oil Co.*, 20 M. R. 345.

An oil lease may be in pay though not yielding repayment of original cost. Operator is the judge of whether it will pay using good faith. *Lowther Oil Co.* v. *Miller Sibley Oil Co.* 53 W. Va. 501; 22 M. R. —.

A lease provided that it should continue so long as the landlord received a revenue of $1,000 a year royalty on the iron made on the premises: *Held*, to create a lease from year to year and not a tenancy at will. *Heck* v. *Borda*, (Pa.) 6 Atl. 392.

A lease for twelve years "or as long as oil is found in paying quantities," construed to end when oil not further found in paying quantities. *Eaton* v. *Allegany Gas Co.*, 122 N. Y. 416; 25 N. E. 982.

A gas lease provided for a rental "while the same is being used off the premises:" *Held*, lessee not bound to sell gas, off the premises. *Ohio Co.* v. *Lane*, 59 Oh. St. 307; 52 N. E. 791.

Boring well to such point that it may be reasonably inferred that if worked it would yield, is not a compliance with the terms of lease requiring oil to be found in paying quantities by a date certain. *Murdock West Co.* v. *Logan*, 69 Ohio 514; 69 N. E. 984.

An oil and gas lease with time limit and the phrase: "So long as oil or gas should be found in paying quantities," expires by limita-

Appeal from Court of Common Pleas, Washington County.

Ejectment by Cecelia Cassell against W. B. Crothers. Judgment for defendant. Plaintiff appeals. Affirmed.

The opinions of the court below are as follows (McILVAINE, P. J.):

FACTS FOUND.

1. On April 22, 1887, W. B. Crothers, the defendant, leased his farm in Buffalo township, in this county, containing 96 acres, more or less, to the Marshall Oil Company, "its successors and assigns," "for the sole and only purpose of drilling and operating for petroleum oil and gas for the term of ten (10) years, and as long thereafter as oil or gas is found in the land herein described in paying quantities," with the right "to remove at any time any and all machinery, oil-well supplies, or appurtenances and property of any kind to said party of the second part belonging or by it placed on said premises." "In consideration of said lease," "the said party of the second part" agreed "to pay to said party of the first part five hundred dollars annually for each gas well, from the time said gas is conducted and used or sold off of said prem-

tion if no well is drilled within the time limit. *Indiana Co.* v. *Pierce*, — Ind. App.—; 68 N. E. 691.

Where the lease is for one year and so long thereafter as oil and gas produced in paying quantities, the lease expires at the end of one year, unless gas has been found in paying quantities. *Chaney* v. *Ohio Co.*, — Ind. App. —; 69 N. E. 477.

A lease for "so long as gas or oil may be found in paying quantities" is not void for uncertainty. *Dickey* v. *Coffeyville Co.*, — Kan. —; 76 Pac. 398.

Oil and gas leases are in the nature of licenses vesting a right upon production of the mineral sought for. *Id.*

A lessee, though within the literal wording of the lease, may not declare a paying well to be non-paying. *Id.*

ises;" and, "in further consideration of said lease," "the party of the second part" agreed "to deliver to said party of the first part the one-eighth (1/8) of all the oil produced and saved from said premises, and to deliver the same to a pipe line for the said party of the first part."

2. The rights of the Marshall Oil Company by assignments were transferred and vested in Cecelia Cassell on March 18, 1891, and were held by her from that date until the bringing of this action.

3. A number of wells were drilled on this farm under this lease shortly after its execution, and oil, but not gas, was found in paying quantities. The term of the lease (10 years) expired on April 22, 1897, and at that time there were five wells that had been or were being pumped for oil. On July 1, 1897, four wells were producing oil, and on November 14, 1897, only three. On the last-named day all the oil in the tanks was run into the pipe line, all the wells were shut down, and the loose tools were locked up, and the employees in charge of the lease left it, and none of them returned, except as hereinafter stated. At the time the wells were thus shut down they were making, in all, about one or two barrels of oil per day, and were not at that time producing oil in paying quantities; a production of eight or ten barrels per day being necessary before it could be said that the premises leased were producing oil in paying quantities. The wells were shut down and left, as we have indicated, by the field manager, in pursuance of directions received from the attorneys in fact of Cecelia Cassell, the plaintiff, which directions were contained in the following letter:

"New York, November 9, 1897.

T. E. Sloan,

Taylorstown, Pa.

Dear Sir: In reply to yours of November 8th, would say that we have recently written Mr. Malick to instruct you to

shut down the Blayney well and the W. B. Crothers farm for the winter. It is not our intention to clean out any wells in that section before next spring. Our Mr. Malick will see you soon, as he intends to make a trip to Taylorstown shortly.

Yours truly,

Bettman, Watson & Bernheimer."

These people controlled a number of wells in this "section" besides those on the Crothers farm, some of which were not shut down.

4. Some time in April, 1898, W. B. Crothers, the defendant, entered and took possession of all the wells and property of the plaintiff, including boilers, engines, steam pipe, sucker rods, tools, etc., claiming that the term of the lease had ended, and that the leased premises, and everything found thereon, belonged to him. He shot and cleaned out some of the wells, rebuilt some of the rigs, and repaired some of the machinery, and by the 1st of July, 1898, was producing oil in paying quantities, to wit, eight or ten barrels per day. On the 15th or 16th of May, 1898, the plaintiff, knowing what the defendant had done, sent an employee to take charge of her wells on this farm, who was ordered off and threatened with arrest by the defendant; he, in justification of his action, claiming that the plaintiff had no longer any rights under the lease of date April 22, 1887. Between November 14, 1897, when the wells were shut down, and May 15 or 16, 1898, when this employee made his appearance, no one in behalf of the plaintiff had done anything upon the leased premises. On the 24th day of August, 1898, this action of ejectment was brought to recover possession of this tract of land for oil and gas purposes.

CONCLUSION.

From the foregoing facts we hold as follows:

1. The plaintiff did not abandon her rights under the lease.

2. The plaintiff did not forfeit her rights under the lease; but,

3. The period for which she held under the lease, on November 14, 1897, became subject to termination, as oil or gas was not being produced in paying quantities, and that the defendant on April 1, 1898, had a right to re-enter to determine it.

4. This did not give him the right, *eo instante,* to take and convert to his own use the plaintiff's personal property found upon the lease, or such fixtures as she had not had, after notice, a reasonable time to remove.

5. The plaintiff's remedy against the defendant for taking and appropriating any personal property or fixtures which she had a right to remove is not an action of ejectment.

HOW THE COURT ARRIVED AT ITS CONCLUSIONS.

A lessee's rights under an oil lease may be terminated by "abandonment," by "forfeiture," and by "expiration of the term" for which the lease was made. "Abandonment is the relinquishment or surrender of rights of property by one person to another. It includes both intention to abandon and the external act by which the intention is carried into effect." 1 Am. & Eng. Enc. Law (2d Ed.) 1, and notes.

The position that the plaintiff, when she caused the wells on this lease to be shut down and the tools safely locked up, intended to abandon her claim to the lease, and her right to remove personal property of great value, is, under the facts, found clearly untenable. The letter of the attorneys in fact shows that no abandonment was intended, and the writer of the letter says in his testimony that none was intended, but that they expected to come back in the spring and clean out the wells. And we think it is clear, independent of his testimony as to their intention, that the plaintiff intended in the spring to come back, and either clean out the wells, or remove

her personal property, the right to remove which was given by the lease. "Forfeiture means the loss of something as a penalty for doing or omitting to do a certain required act. In the lease under which the plaintiff claims we are unable to find any covenant, expressed or implied, that the plaintiff so far failed to perform that would forfeit to the defendant, not only her right to take the oil and gas found in the land, but her right to remove 'at any time any and all machinery, oil-well supplies, or appurtenances and property of any kind to her belonging.' Forfeitures are not favorites of the law, and equity may relieve against them, even where the act of the party out of which the forfeiture arises is unequivocal and undisputed. In the case at bar the only grounds upon which the defendant might claim that the plaintiff had forfeited all her rights under the lease is that she shut the wells down. But she was only bound under her implied covenant to operate them as long as oil and gas were found in paying quantities. If oil and gas were not being found in paying quantities, she had the right to shut down the wells, and take such time as the defendant would allow her, or as was reasonable, to remove her machinery. But suppose, for the sake of the argument, that there had been written in this contract of lease these words: 'If oil is found in paying quantities, the lessee shall operate the producing wells continuously, and with reasonable diligence; and if he fails to do so, and thus deprives the lessor of his royalty, he shall forfeit to the lessor his rights to further operate, and the oil and gas remaining in the leased premises shall revert to the lessor.' Would such a clause of forfeiture be self-operating, and would it affect the right to remove the machinery? In our opinion it would not. It would be operative only from the time the lessor elected to enforce it. And the lessor could not, by the same act, terminate the lease and appropriate the personal property and fixtures of the lessee to his own use. A reasonable time should be given to remove these after the forfeiture was de-

clared. Surely, equity would not allow a forfeiture of the lease, and what was demised and granted by it to the lessee, to carry with it a forfeiture of the right reserved to the lessee to remove his machinery, etc., unless the forfeiture of the machinery was also expressly provided for. 'Where a lease provided for forfeiture for non-payment of royalty, and also that new buildings placed upon the land by the lessee might be removed at the termination of the lease, unless all right thereto has been forfeited by a forfeiture of the lease,' held, that the right to remove buildings within a reasonable time was not lost by forfeiture for non-payment of royalty. The forfeiture for non-payment was a forfeiture of the lease only, and it should clearly appear that it also provided for the forfeiture of the buildings before it can be declared so." Barring. & A. Mines, p. 151; *Mickle* v. *Douglas,* 75 Iowa, 78, 39 N. W. 198. See 12 Am. & Eng. Enc. Law, 758, note 7; *Wick* v. *Bredin,* 189 Pa. St. 83, 42 Atl. 17.

This brings us to the consideration of a question that, so far as we know, has not been before any of our courts; and that is, what is the true interpretation to be put upon the words, "and as long thereafter as oil or gas is found in the land herein described in paying quantities," as found in this lease? The parties fixed the term of the lease at 10 years, which expired on April 22, 1897, but they provided, in case oil or gas was being profitably mined at the end of this term, that it could be extended to another date, to be fixed by the failure of the land leased to yield oil or gas in paying quantities. When this uncertain date was capable of being made certain, then the lease could be terminated; and after that date the lessee, if he did not surrender the premises, was a tenant at will, and the landlord could at any time enter and repossess himself of the premises demised, and after such entry the rights of the lessee to the oil and gas, even if it was afterwards discovered in paying quantities by the landlord, would be terminated. The true interpretation of the

words, "as long thereafter as oil or gas is found in the land in paying quantities," is not "as long thereafter as oil or gas can be found in the land in paying quantities by any one," so as to give the lessee a tenancy until all the oil and gas in the land shall be exhausted, but is this: "as long thereafter as oil or gas is actually being found in the land in paying quantities, under such developments as the lessee has seen fit to make under her covenants in the lease." Taking her manner of operating the lease, the 10-year term having expired, the moment she failed to produce oil in paying quantities, that moment the tenancy became a tenancy at will, which could be ended at any time by either the tenant or the landlord. We cannot see how a lessee in an oil lease on a royalty, not an annual rental, holding over (after a definite term has expired) under the extension of the term for "as long thereafter as oil is found in paying quantities," can be a tenant from year to year, as suggested by the counsel for the plaintiff. In a tenancy from year to year, "the holding over implies a term of the same duration as the original term, and the payment of an annual rental." The lease here definitely fixes the length of the extended term. A failure at any time after April 22, 1897, to produce oil in paying quantities, ends it, and a holding over after that contingency could not, by implication, be for the purpose of producing oil. After the failure to produce oil in paying quantities, the plaintiff's rights are limited (if the defendant elects to terminate the lease) to the removal of the machinery, and to a possession for a reasonable length of time that this might be accomplished, if the property has not been taken, but remains as the plaintiff left it when he stopped producing oil. Where oil was no longer being produced in paying quantities, the lease was liable to be terminated, and after that, in our opinion, it must be regarded as a tenancy at will, and not from year to year, or, if not a tenancy at will, then a tenancy at sufferance.

In conclusion, then, our opinion, under the facts and the law as we have found them, is that when the wells were shut down in November, 1897, when they were not producing oil or gas in paying quantities, and when the plaintiff left the premises for the winter, the tenancy became a tenancy at will, and that the defendant then and afterwards, so long as these conditions remained, had the right to terminate the lease, and that his entry in April, 1898, to terminate it, if confined solely to that purpose, was not unlawful; but that he had no right, as part of the act terminating the lease, to take and appropriate the plaintiff's machinery, oil-well supplies, and other personal property. He could not lawfully enter to take the fixtures. It was his duty—she not having elected to terminate the lease nor having consented to the entry of the defendant—to give her a reasonable time and opportunity after notice, to remove her property. "Where the tenancy is uncertain in duration, as when it depends upon a contingency, or when the lessee is a tenant for life or at will, the law allows a reasonable time for the removal of fixtures." 8 Am. & Eng. Enc. Law (1st Ed.) 62.

And this brings us to the question, what kind of a judgment should be entered in this case on our findings? We are asked to enter a judgment for the plaintiff, if not generally, at least for the possession of the land "for the purpose of removing the property placed thereon by the lessee and its assigns in the operation for oil and gas." It is true that ejectment is an equitable remedy, and conditional judgments are sometimes entered to force the defendant to do equity. But in this case the evidence shows that the plaintiff's property has been appropriated by the defendant, and much of it has been changed in character, and we do not see how, in an action of ejectment, we could mold a judgment that would give to both parties their rights. The most that we can do for the plaintiff is to mold the judgment so as to show that her right to the machinery, oil supplies, pipes, boilers, en-

gines, tools, etc., on the land in dispute, and taken by the defendant as she claims unlawfully, is not adjudicated in this case, and her property is not, by reason of the judgment herein entered, to be considered as part of the land (the possession of which is found to rightfully be in the defendant) at the time he re-entered in April, 1898.

Plaintiff's points and answers thereto were as follows:

1. The plaintiff, under the lease made by the defendant, was in possession of said land under a tenancy from year to year, and could not be dispossessed without due and legal notice to quit given by the defendant. *Answer:* Refused.

2. That, under all the evidence in the case, the plaintiff is entitled to the possession of the land in dispute for oil and gas purposes. *Answer:* Refused.

3. If second point is refused, then, under all the evidence in this case, the plaintiff is entitled to the possession of the land for the purpose of removing the property placed thereon by the lessee and its assigns in its operations for oil and gas. *Answer:* Refused.

On exception, McIlvane, P. J., filed the following opinion:

The exceptions taken by the plaintiff to the decision of the court in this case are to the conclusions of law, and not to the findings of fact, and raise two questions which merit consideration: First. In April, 1898, when the defendant dispossessed the plaintiff, was she a tenant from year to year? Second. Under the facts in this case, is ejectment the plaintiff's remedy to recover the "machinery, oil-well supplies, and other property" placed by her and her predecessors in title upon the leased premises, granting that her title to the leasehold estate was terminated by the entry of the defendant? In other words, should the plaintiff's third point have been affirmed, and judgment entered in accordance therewith?

First question: The unique character of an "oil lease" makes it somewhat difficult to apply the well-established rules that, under the common law, apply to the ordinary lease, where the relation of landlord and tenant, pure and simple, is created. In an oil lease the "lessor" and the "lessee" sustain a dual relation to each other. In a sense they are landlord and tenant, but they also sustain the relation of "grantor" and "grantee" of an interest in lands. The lessee is a tenant as to the surface of the land, so far as it may be necessary to carry on his mining operations, but, as to the oil in the land after it is discovered by the drill, he is the "grantee,"—the owner in fee simple. The lessor for the occupancy of the surface of the land does not, as is usual with landlords, receive a rent,—a compensation payable periodically,—nor does he receive part of the produce of the land leased. He receives part of the land itself,—a royalty. A part of the oil mined and oil in place is real estate. The tenancy of the plaintiff in this case, which alone related to the surface of the defendant's land after April 22, 1897, was not in consideration of the payment of a sum of money periodically made, but depended upon the continued production of oil in paying quantities; or, stated negatively, upon the exhaustion of the mineral that was being mined. The moment that oil was not being produced in paying quantities, and that fact was ascertained and declared, that moment the right to occupy the surface for oil and gas purposes ceased, regardless of the fact that the termination of the fixed term of the lease was on April 22, 1897. To say that the lease after April 22, 1897, was a lease from year to year, would be to change the contract of the parties from a lease to continue "so long thereafter as oil may be found in paying quantities" to a lease to continue "so long thereafter as oil may be found in paying quantities, provided the termination shall only occur on April 22d, the end of a year counting from April 22, 1897, the end of the fixed term." That is to say, if the

leased premises actually and beyond dispute produced some oil, but not in paying quantities, say on April 24, 1897, the lessee, for the gain of the lessor, would be bound to pump the wells at a loss until April 22, 1898, there being some to be pumped; or, if the oil was totally exhausted, the lessee could retain the surface of the land for one year, lacking two days, without compensation to the lessor. Surely, the parties did not intend this. Again, suppose that on November 14, 1897, the plaintiff, in place of shutting down, had, against the will of the defendant, removed all her machinery, oil-well supplies, and other property because the lease was not producing oil in paying quantities; could the defendant (admitting the fact that oil was not being produced in paying quantities) maintain an action against the plaintiff for royalties for the year ending April 22, 1898, fixing the amount at the same as he received the year ending April 22, 1897? Certainly not. As we said in our attempt to vindicate our conclusions of law in the decision heretofore filed, we know of no case where the question here raised has been passed upon by any of our courts. Adopting a rule, then, that will do equity to both parties, we hold that in an oil lease for a fixed period, and "as long thereafter as oil is found in paying quantities," where the lessor's compensation is one-eighth of the oil produced, the tenancy as to the surface of the land, after the expiration of the fixed period, and after the fact that oil is not being found and produced in paying quantities becomes susceptible of proof, is a tenancy in the nature of a tenancy at will, and, if not actually terminated by mutual consent, or continued by mutual consent, in order that further exploration be made, may be terminated by either party.

Second question: Here we have another new question. At first our mind was inclined to yield to the argument of counsel for the plaintiff. But on reflection, our best judgment is that the wrong the defendant did (if any) was

not so much against the plaintiff's right of possession—her right to enter and remove her property—as it was against her title to the personal property in question,—her right to the property itself. From the testimony in the case, and from what was said by the counsel of the defendant at the argument, and from the inferences that can be fairly and legally made from what was developed in this trial, the defendant, when he took possession of the plaintiff's property, not only intended to terminate the leasehold estate, but to actually appropriate and convert to his own use the property that, at least during the running of the lease, was the plaintiff's personal property. Suppose that on the very day that the defendant entered to terminate the leasehold estate he had moved the boilers, engines, loose tools, and other personal property off the land, and sold them; what would the plaintiff's remedy have been? Certainly we could not have entered judgment in this ejectment suit against him conditioned that it would be released and set aside upon his returning to the plaintiff the personal property or the money he received from its sale. The defendant did not sell the property, it is true, but he took it, and converted it to his own use, and to some extent has changed its character. And, if it was personal property when the defendant appropriated it to his use (and not part of the real estate, as claimed by the defendant), then we take it the plaintiff's remedy against the defendant would be the same as against a stranger to the lease, or as it would have been against the defendant had he, during the 10-years term, taken and appropriated to his use the personal property.

The controversy between the plaintiff and defendant (granting that the plaintiff is not entitled to the possession of the land in dispute for oil and gas purposes) turns upon the question whether the machinery, oil supplies, and other property on the land, when they were appropriated to his use by the defendant, was personal property or part of the

real estate. If the latter, then the plaintiff's third point could not be affirmed; if the former, then the defendant was guilty of trover and conversion, if the property, as we have found, was not abandoned nor forfeited, and the third point could not be affirmed.

And now, April 8, 1899, exceptions overruled, and it is ordered that judgment be entered in accordance with decree herein filed with decision on February 2, 1899.

H. M. DOUGAN and JOHN W. & A. DONNAN for appellant.

T. F. BIRCH, for appellee.

PER CURIAM. All the material facts of this case are clearly presented in the findings and opinions of the court below, to whose decision the case was submited by the parties. Our consideration of the record has led us to the conclusion that there is no substantial error therein, and therefore neither of the specifications of error should be sustained.

The questions involved have been sufficiently noticed by the learned trial judge, and on his opinion the judgment is affirmed.

JAMES L. FISHER v. W. S. GUFFEY ET AL.

(193 Pennsylvania 393; 44 Atl. 452. Supreme Court. October 30, 1899.)

Bonus reserved no covenant running with the land. A lessee who assigns a lease of oil lands for a cash consideration, and an additional sum to be paid if oil is found on the premises, cannot recover of a second assignee such additional sum, after oil is found by him; for it is merely a bonus to be paid by the first assignee, and not a covenant to run with the land.

Appeal from Court of Common Pleas, Greene County.

Action by James L. Fisher, for the use of Rachel J. Fisher, against W. S. Guffey and others, to recover a sum

As to what covenants run with the land without express contract, see *Stone* v. *Marshall Co.* 19 M. R. 593; *Edmonds* v. *Mounsey*, 18 M. R. 384.

The assignment by the lessor of an expired lease carries with it the right of action for damages accrued against lessee for breach of its covenants. *Indianapolis N. G. Co.* v. *Pierce*, 25 Ind. App. 116; 56 N. E. 137.

Assignment of ore contract—acquiescence in first assignment no estoppel to object to the second. *Arkansas Valley Co.* v. *Belden Co.* 127 U. S. 379.

Assignee is bound to inquire whether lease has been forfeited. *Carnegie Co.* v. *Phila. Co.* 158 Pa. 317; 27 Atl. 951.

Assignee of lease bound after he again assigns, for back rent. *Consolidated Coal Co.* v. *Peers*, 150 Ill. 344; 37 N. E. 937.

Instance of assignment of gas lease after, by the court's construction, the term had expired. The lessor suing the assignee upon it as a vivant lease: *Held*, that there was no privity of estate and that he could not recover. *Chaney* v. *Ohio Co.*, — Ind. App. —; 69 N. E. 477.

A lessor treating by correspondence with assigns of the lease is estopped to deny assent to the assignment. *Warner* v. *Cochrane*, 128 Fed. 553.

Where lessee is bound by a date certain to pay up the shortage on his covenant to mine so many tons and pay royalty on same and at same time has right to demand a renewal, he is not bound to pay the shortage when the renewal is refused. *Id.*

alleged to be due as part of the consideration of a certain leasehold interest. From a judgment for defendants, plaintiff appeals. Affirmed.

J. L. Fisher, holding certain oil leases assigned them to F. B. Tomb, who assigned again until they came to the defendants. The operative words upon which the decision turned were as follows "For and in consideration of the sum of five hundred dollars * * * and the further consideration of the sum of one thousand dollars, if oil is found in any well drilled on any of the territory herein described and said well or territory be further operated by the said F. B. Tomb (or assigns) I, J. L. Fisher hereby sell, assign," etc.

JAMES J. PURMAN, J. P. TEAGARDEN and S. F. GRIM, for appellant.

JAMES E. SAYERS and M. F. ELLIOTT, for appellee South Penn Oil Co.

FELL, J. The demurrer of the South Penn Oil Company was sustained, on the ground that the statement filed disclosed no cause of action against it. The averments relied upon to sustain the action may be briefly stated: J. L. Fisher, the plaintiff, sold and assigned a number of leases, covering about 4,000 acres of land, to B. F. Tomb. The consideration named in the assignments was $500 paid at the time, and $1,000 to be paid thereafter, in case oil was found in any well drilled and the territory was further operated by Tomb or his assigns. This assignment was subject to the conditions, as to the payment of rents and royalties, contained in the lease to Fisher. Tomb assigned these leases to Guffey and Queen, who assigned them to the South Penn Oil Company. The oil company drilled a well, found oil, and is further operating for oil. The contention of the plaintiff is that the

obligation of Tomb to pay $1,000 additional if oil was found is a covenant running with the land, and that, by reason of the assignments mentioned, the South Penn Oil Company is liable for the payment of this amount to him.

It was within the power of the plaintiff, while holding the leasehold interest, to exact covenants which would bind a subsequent assignee in possession of the land, but that he did not do so is manifest. He parted with his whole interest for a present consideration paid, and a future contingent consideration to be paid by Tomb if oil was found in paying quantities. Tomb took the assignments subject to all the conditions of the original leases, and to the payment of the rents and royalties reserved, and he paid $500 for the transfer, and agreed to pay $1,000 additional if oil was found. This was merely a bonus. We see no indication that the parties meant to charge the land, and, unless it appears that there was an intention to create a charge, it is useless to pursue the inquiry further.

The judgment is affirmed.

FRED AYE ET AL. V. THE PHILADELPHIA COMPANY.

(193 Pennsylvania 451; 44 Atl. 555. Supreme Court, November 6, 1899.)

[1]**A reference in a later lease** to an outstanding prior lease construed as notice of the claim of the first lease and the assignment to the second lessee of the right to treat the first lease as forfeited.

[2]**First test well dry.** Where an oil lease provides for the completion of a test well within a certain time, but makes no provision for the contingency of the test well proving dry, there is an implied obligation on the lessee, after having completed a test well which has proved dry, to proceed further with the exploration and development of the land with reasonable diligence according to the usual course of the business.

[3]**A failure to so proceed** with the exploration is an abandonment, which will sustain a re-entry by the lessor.

The rule, that where the parties have expressly agreed on what shall be done there is no room for the implication of anything not so stipulated for, is equally as applicable to oil and gas leases as to any other contracts.

Abandonment a question of fact. Whether or not a lessee has abandoned his lease so as to entitle the lessor to re-entry is for the jury to determine from the acts and intentions of the parties.

Appeal from Court of Common Pleas, Armstrong County.

Action of ejectment by Fred Aye and others against the Philadelphia Company. There was a judgment for plaintiffs, and defendant appeals. Reversed.

[1]The assigns of one who takes a lease with knowledge of a prior lease have no greater rights than their assignor. *Henderson* v. *Ferrell*. 19 M. R. 205. See notes to *Fisher* v. *Guffey*, *ante* p. 174.

[2]No obligation to sink a second well. *Steelsmith* v. *Gartlan*. 19 M. R. 315.

An oil lease is forfeited for failure to keep on sinking though the stipulated number of wells are sunk and the annual rent paid. *Florence Co.* v. *Orman*. — Colo. App. —; 73 Pac. 628.

One well to ten acres is considered proper development. *Guffey Co.* v. *Oliver*. — Tex. —; 79 S. W. 884.

[3]**What amounts** to compliance with covenant to commence operations. *Fleming Co.* v. *South Penn Co.*, 37 W. Va. 645; 17 S. E. 203.

The plaintiffs claim under a lease dated July 11, 1887, from Wm. M. Campbell to them, for the exclusive right of drilling and operating for petroleum and gas, 100 acres of land in Armstrong county, the material portions of which lease are as follows:

"The parties of the second part, their heirs or assigns, to have and to hold the above described premises for and during the term of twenty years from the date hereof, and as much longer as oil or gas is found in paying quantities thereon.

"The said parties of the second part, in consideration of the said grant and demise, agree to give to the party of the first part the full equal one-eighth part of all the petroleum obtained or produced on the premises herein leased and to deliver the same in tanks or pipe lines to the credit of the party of the first part. * * *

"The parties of the second part agree to drill a test well in the vicinity of the above described premises within six months from the date hereof, unless prevented by accident, etc., and if oil is found in paying quantities in said test well, the parties of the second part further agree to complete one well on the above described premises within six months from the completion of said well, or within one year from the date hereof or thereafter to pay the party of the first part for such a delay a yearly rental of fifty cents per acre from the time of completing such well on the above described premises payable directly to the party of the first part. And the party of the first part agrees to accept such sum as full payment for such delay until a well shall be completed on the above described premises; and a failure to complete such well or make such payment renders this lease null and void, and said parties of the second part upon surrendering, or offering to surrender this lease shall be released and discharged from making said payment or payments, and from all claims or demands for damages arising or growing out of a failure to drill or complete said well or wells, and the said lease shall remain without effect between the parties hereto."

The defendant claims under a lease dated October 2, 1891, for the same land from the said Campbell to Wm. C. Bailey & Company, which contained this provision:

"It is further agreed by the parties of the second part, that should lease under date of July 5, 1887, taken by Aye Bros. and R. S. Martin as the second part thereto be in full force and effect, then

the said parties of the second part hereto agree to release said party of the first part of the demands above described and set forth."

Other facts appear by the opinion of the Supreme Court. The Court gave binding instructions for plaintiffs.

WILLIAM SCOTT, ORR BUFFINGTON, JOHN DALZELL and GEORGE B. GORDON, for appellant.

M. F. LEASON, W. D. PATTON, J. B. NEAL and JOHN H. PAINTER, for appellees.

MITCHELL, J. The lease to Aye and Martin being referred to in the lease from Campbell to Bailey, the appellant, as assignee of Bailey, must be held to have taken with notice. The recital of the prior lease, however, was not an affirmance by Campbell of its continuing validity, but a disclaimer by him of responsibility on that subject. It was a refusal to declare or enforce a forfeiture himself, but a transfer of his right in that regard, whatever it might turn out to be, to appellant, which assumed the risk. Its entry and commencement of operations on the land were an enforcement of a forfeiture for abandonment, if Campbell had that right. This depends on the circumstances. By their lease from Campbell, the appellees covenanted to complete a test well in the vicinity within six months, and, if oil should be found in paying quantities, to complete a well on the leased premises within the next six months, or pay a yearly rental per acre for the delay. The royalty reserved as rent by the lessor was one-eighth of the oil produced. The lease was made July 11, 1887. The test well was put down on a farm in the vicinity, but produced no oil. A second well was drilled on another farm, with like result, and operations then ceased, without any well on the leased premises. On October 2, 1891, Campbell leased to Bailey, and on June 19, 1892,

Bailey assigned his lease to the appellant. The lease from Campbell to appellees, it will be seen, contained express covenants what the lessees should do in a certain event, but made no provision for the contingency of the test well proving dry, which is what actually happened. In such case, it becomes necessary to inquire what covenants, if any, are implied. It was held as far back as *Watson* v. *O'Hern,* 6 Watts, 362, that a lease of a stone quarry, in consideration that the lessee shall pay a certain price per perch for all stone taken out, though called by the parties a "privilege and liberty," is a contract by the lessee that the quarry shall be worked, and failure to do so is an actionable breach. The rule is thus stated by the present Chief Justice in *Koch & Balliet's Appeal,* 93 Pa. St. 434, 442: "Where a right to mine iron ore or other minerals is granted in consideration of the reservation of a certain proportion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine in a proper manner and with reasonable diligence, so that the grantor may receive the compensation or income which both parties must have had in contemplation when the agreement was entered into." So, in *Ray* v. *Gas Co.,* 138 Pa. St. 576, 589, 20 Atl. 1065, it was said by our late Brother Clarke: "Whilst the obligation on the part of the lessee to operate is not expressed in so many words, it arises by necessary implication. * * * If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops, in the nature of rent, it would be absurd to say because there was no express engagement to farm, that the lessee was under no obligation to cultivate the land. An engagement to farm in a proper manner, and to a reasonable extent, is necessarily implied." That was the case of an oil and gas lease, and it has been said that the doctrine is peculiarly applicable to such leases, owing to the nature of the product. *McKnight*

v. *Gas Co.*, 146 Pa. St. 185, 23 Atl. 164; *Venture Oil Co.* v. *Fretts*, 152 Pa. St. 451, 25 Atl. 732.

The rule in regard to contracts is that, where the parties have expressly agreed on what shall be done, there is no room for the implication of anything not so stipulated for, and this rule is equally applicable to oil and gas leases as to other contracts. There is nothing peculiar about them in this respect. But here the parties have provided for a test well, and for what shall be done if it produces oil in paying quantities. But the other contingency, that it proves dry, is not provided for, and it is the omitted case that has occurred. The authorities are uniform that, under such circumstances, there is an implied obligation on the lessee to proceed with the exploration and development of the land with reasonable diligence, according to the usual course of the business, and a failure to do so amounts to an abandonment which will sustain a re-entry by the lessor. Abandonment is a question of fact, to be determined by the acts and intentions of the parties. An unexplained cessation of operations for the period involved in this case gives rise to a fair presumption of abandonment, and, standing alone and admitted, would justify the court in declaring an abandonment as a matter of law. But it may be capable of explanation, and is therefore usually a question for the jury on the evidence of the acts and declarations of the parties. *Stage* v. *Boyer*, 183 Pa. St. 560, 38 Atl. 1035. It should have been so left to them in this case.

Judgment reversed, and venire de novo awarded.

FRED AYE ET AL. v. THE PHILADELPHIA COMPANY.

(193 Pennsylvania 457; 44 Atl. 556. Supreme Court. November 6, 1899.)

[1]**Where the lessees in an oil lease fail to put their lease on record. and never go into actual possesion or occupation of the land, their title may be cut out by that of a subsequent purchaser for value without notice.**

[2]**The drilling of a well in the vicinity, but on another farm, while *pro tanto* a fulfilment of their covenant with their lessor, is not sufficient to put any one else on inquiry.**

Appeal from Court of Common Pleas, Armstrong County.

Action of ejectment by Fred Aye and others against the Philadelphia Company. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

The facts appear by the charge of the Court, which was as follows:

At and prior to July 11, 1887, Matthew Louden was the owner of a tract of land in Kittanning township. At that date, namely, July 11, 1887, he made a lease of that tract of land to R. S. Martin, for the purpose of having the same developed for oil and gas. By the terms of that lease, the lessees, Martin and Aye, who had an interest in it, agreed to put a well down upon the piece of property—not upon that piece of property, but upon a piece of property in the vicinity

[1]Possession is notice where the circumstances are such as to put a reasonable man on inquiry. *Coffee* v. *Emigh*, 15 Colo. 184; 25 Pac. 83.

A lease is valid without record, but not as against bona fide purchasers. *Barnum* v. *Landon*, 14 M. R. 250.

[2]The court take judicial notice that the only absolute test of whether oil exists under specific land is by boring a well. *Consumer's Co.* v. *Littler*, — Ind. —; 70 N. E. 363.

of this—as a test well. The evidence shows that there were a certain number of leases taken by Martin and these other men, and the agreement was that there was to be a test well put down in the vicinity. Now, the evidence shows the test well was put down in the vicinity, in accordance with the terms of this lease; that is, it was put down on the McClune farm. By an arrangement and agreement between Martin and Aye Brothers, and with Messrs. Brown, Piper, Smith and Reese, the other plaintiffs in this case, they became interested in the lease, and I believe there was another well put down in the vicinity. Some friction arose between these parties that held the lease upon this piece of property in reference to the development of the property they had leased in that neighborhood, and there was nothing further done towards developing the property at that time; and on October 3, 1891, Matthew Louden leased this same property, for the purpose of having it developed for oil and gas, to W. C. Bailey & Brothers. On June 13, 1892, W. C. Bailey & Brothers sold or assigned these leases they had taken, including the lease in controversy here, as to the property of Louden, to the defendant. Now the question to be determined here is: Whether or not the plaintiffs here have a right to recover the possession of the property in suit, for the purpose of developing it for oil and gas, and eject the Philadelphia company from the possession of it? The evidence does not seem to be very much in dispute as to the occupancy of the land, and as to the fact that these leases were given; and as we consider it, it is partly a question of law in this case, and after the court instructs you upon the law, that if you find certain facts, your verdict will be so and so, we think you will not have much difficulty in the matter.

You will recollect the evidence shows in this case that, at the time Bailey got the lease from Louden, Mr. Louden told Bailey that there was an existing lease, that is, the Martin

lease was out, and that thereupon Bailey agreed to protect Louden as against that lease. Now the evidence shows that at the time this lease was transferred to the defendant company by Bailey and his brothers, there was no notice of the fact of the pre-existing lease given to the Philadelphia company. You have the evidence of Mr. Truby that he did this business for the defendant company, purchased the leases and paid for them; that he had no notice of the pre-existing lease, nor was there any notice given him by Bailey, as Bailey testifies; and he also states that he examined the records of Armstrong county and that he found no lease upon record, and it is a fact undisputed, that the lease of the plaintiff here of this property never was placed upon the record. Now, as we view the law in this case, it appearing from the evidence, if you find the evidence to be correct, that the defendant purchased these leases, including the one in suit, from Mr. Bailey, and they had no notice of the prior lease, the existence of it, that they were bona fide purchasers for value of these leases; that they are not bound by the existence of the former lease; they being bona fide purchasers for value, why, they had no notice of the existing rights of these parties prior to the time they had entered into the contract of purchase and paid their money. That being the fact, gentlemen, you would find that to be a fact, it would be your duty to find in this case a verdict for the defendant.

We think it is not necessary to instruct you anything on the question of abandonment. From the evidence and law in this case it would be unnecessary for you to take that into consideration; it would be, of course, if this were an action of ejectment against Bailey for the occupancy of the land, he having had notice from Louden of the pre-existence of this lease, he would be estopped from setting up that as a defense; but you have here the further fact of the sale to these men, and the evidence not showing that the defendant company

had any notice of the existence of the lease, and they having paid a valuable consideration for it and entered into a contract, the contract being fully executed before any notice was brought to them, it would be your duty to find a verdict for the defendant in this case.

M. F. LEASON, J. B. NEAL, JOHN H. PAINTER, and W. D. PATTON, for appellants.

WILLIAM SCOTT, ORR BUFFINGTON, JOHN DALZELL, and GEORGE B. GORDON, for appellee.

MITCHELL, J. Plaintiffs failed to put their lease on record, and never went into actual possession or occupation of the land. The drilling of a well in the vicinity, but on another farm, while *pro tanto* a fulfilment of their covenant with their lessor, was not sufficient to put any one else on inquiry, and they thus left their title open to be cut out by that of a subsequent purchaser for value without notice. The defendant occupies that position. With nothing on the land to put it on inquiry, and no knowledge or notice in fact of the prior lease, it had a right to rely on the record that showed a clear title in the lessor. The knowledge of the assignor of the lease, Bailey, not being communicated to it, could not affect it in any way.

Judgment affirmed.

M. F. LEECH ET AL. v. JOSEPH E. CLEMONS.

(14 Colorado Appeals 45; 59 Pac. 230. Court of Appeals. November 13, 1899.)

The court will not look beyond the printed abstract into the record to support error assigned by the party who prepared the abstract.

Instruction as to other brokers. An instruction to the effect that, where a principal employs several agents to sell a piece of property the agent through whose efforts the purchaser is produced is alone entitled to commission, is erroneous where there is no evidence that any other agent than plaintiffs had been employed.

Introduction not essential. Where an agent produces a customer and is the procuring cause of a sale he is entitled to his commission notwithstanding he may not have formally introduced the purchaser to his principal.

Previous payment to wrong party. Where agents authorized by the owner to sell property are instrumental, through an employee of a sub-agent in producing a purchaser, and the principal completed the sale with knowledge of their claims, they are entitled to recover their commission notwithstanding the principal had already paid a commission to the party who actually introduced the purchaser.

Contract construed that broker should furnish, not merely call attention to, "capital" to a prospect. *Baum* v. *Rainbow Co.* 42 Oreg. 453; 71 Pac. 538.

Action where broker misrepresented to buyer the actual price he was to pay the owner. *Tegarden* v. *Big Star Co.* 71 Ark. 277; 72 S. W. 989.

Parol promise by buyer to pay commissions due from the seller is void under statute of frauds. *Wulff* v. *Lindsay*, (Ariz.), 71 Pac. 963.

Employment of sub-agents by mining brokers and their payment by commissions discussed and held to be against public policy. *Chilberg* v. *Lyng*, 128 Fed. 899.

Principal held when he refused to ratify his broker's contract of sale. *Neilson* v. *Lee*, 60 Cal. 555.

Property rights in a seat in the stock exchange considered. *Clute* v. *Loveland*, 68 Cal. 254; 9 Pac. 133.

Stock sold on false representations that others had agreed to sell at a certain price. *Wallace* v. *Hopkins*, (Cal), 18 Pac. 673.

Broker must obey orders, must use telegraph—measure of dam-

Appeal from District Court, Boulder County.

Action by M. F. Leech and another against Joseph E. Clemons. Judgment for defendant, and plaintiffs appeal. Reversed.

GUY D. DUNCAN and PATTERSON, RICHARDSON & HAWKINS, for appellants.

RIDDELL & STARKWEATHER, for appellee.

THOMSON, J. The appellants sued the appellee for a commission on the sale of a mine, negotiated by them, as they alleged, as the agents of the defendant. The trial went against the plaintiffs, and they appealed to this court.

Error is assigned to the rejection of evidence and the giv-

ages for not selling when instructed. *Galigher* v. *Jones*, 129 U. S. 193.

Defendant received money to purchase mining stock which he sold at a profit: *Held*, that such indebtedness was a debt created while acting in a fiduciary capacity and so not discharged by the insolvent act. *Herrlich* v. *McDonald*, 80 Cal. 472; 22 Pac. 299.

On sale neither consummated nor contract for enforceable, no commissions are earned. *Hammond* v. *Crawford*, 66 Fed. 425.

A commission contract may be made by an agent. *Root* v. *Fay*, (Ariz.), 43 Pac. 527.

Where a broker gives his own note for undisclosed principal the principal is not necessarily held when disclosed. *Krohn* v. *Lambeth*, 114 Cal. 302; 46 Pac. 164.

The owner withdrew from his broker and shortly afterwards sold to the broker's party; held on the facts that broker was not entitled to commission. *Kelly* v. *Marshall*, 18 M. R. 317.

Broker's commission considered as a legitimate expense on accounting. *Shoemaker* v. *Mt. Lookout Co.* 177 Pa. 405; 35 Atl. 731.

Parties cannot make new contract and claim failure of sale on the old contract. *Bishop* v. *Averill*, 17 Wash. 209; 49 Pac. 237.

Recovery by broker on *quantum meruit* on implied contract. *Nyhart* v. *Pennington*, 20 Mont. 158; 50 Pac. 413.

Agreement to divide commissions does not make partnership. *Wheeler* v. *Lack*, 37 Oreg. 238; 61 Pac. 849.

ing of instructions. There is nothing in the printed abstract to enable us to say whether any evidence was improperly rejected or not; and, in behalf of the party by whom an abstract is prepared and filed, we never resort to the transcript. *Kelly* v. *Doyle,* 12 Colo. App. 38, 54 Pac. 394; *Johnson* v. *Spohr,* 12 Colo. App. 317, 56 Pac. 63. The answer denied any employment of the plaintiffs, and averred that the defendant agreed with one Wadsworth to pay him $5,000 to find a purchaser at $60,000, and that Wadsworth took the plaintiff Canfield in as a partner; but denied that either Wadsworth or Canfield had anything to do with the sale which was effected.

There was some evidence that the defendant placed the property with the plaintiff Canfield for sale at $60,000,—the latter to receive a commission of 10 per cent. out of the purchase price,—and that the plaintiff Leech was interested with Canfield in the sale and commission. There was also evidence that the plaintiffs found a purchaser through a party named Burns, that they introduced Burns to the defendant, and that the defendant agreed with him (Burns) that he should have for his services whatever sum he might obtain for the mine over $60,000. There was further evidence that Mr. Burns employed a mining expert named Coan to examine the mine; that the latter closed up the transaction between the defendant and the purchaser Burns had found, receiving as commission $5,000 from the defendant and $5,000 from the purchaser; that the defendant knew that Burns had found a purchaser; and that, before the deal was completed, Canfield saw the defendant, and notified him that he claimed his commission. It appears that the arrangement with Wadsworth, mentioned in the answer, had expired before the alleged authority to the plaintiffs was given. The defendant's testimony was that he did not place the property with any agent; that he told everybody who inquired of him in relation to the matter that his price was $60,000, and that

the commission he would allow was $5,000; that the man who produced the purchaser should have the commission; and that Coan fiulfilled the requirement, and accordingly received the money. The testimony of the defendant was strongly corroborated by other evidence and by circumstances. Nevertheless, there was evidence from which the jury might have found for the plaintiffs, and the only question is whether the case was properly submitted to them.

We do not deem it necessary to notice any of the instructions given, except those numbered 2, 3, and 5, which are as follows:

"No. 2. The jury are instructed that, when several persons are employed by the owner to sell a mine, the agent through whose efforts a purchaser is introduced is alone entitled to a commission. The question for you to decide is, who produced Hanford as a purchaser? If you find that Coan alone did this, then the plaintiffs cannot recover.

"No. 3. The jury are instructed that the plaintiffs, in order to recover, must show that they were the persons who found the purchaser, Hanford; that they introduced him to Clemons; that it was through their efforts that Hanford was found and induced to purchase the mine.

"No. 5. Where the principal has placed property in the hands of different agents, he may pay the commission to one who produced the purchaser. He is relieved from liability to the others, and is not bound to inquire what part, if any, other agents had in the transaction. The owner of a mine may employ as many brokers as he wishes for the sale of the mine. A sale through one agent revokes the authority of the others. He may at the same time sell the mine himself, and the sale made by him revokes the authority of all agents."

The second and fifth are of the same general nature, and may be considered together. We find no fault with the legal proposition which they embody. The difficulty with them is that there was no evidence to which they could be made ap-

plicable. There was nothing in the testimony of the plaintiffs from which even an inference could be drawn that the defendant employed any agents outside of them, or that he placed the property in the hands of any agents but them; and he denied explicitly that he employed any agents at all. According to him, he proclaimed the price he offered for the property, and the commission he would pay to any person who should effect a sale at his price, and left it open to any one to earn the commission; and he employed no one, and placed the property in no one's hands, but invited every person who so desired to compete for the money. We quote from the brief of defendant's counsel: "Neither did he employ, nor put the property in the hands of any agent or broker for sale. He merely stated to all inquirers what he would sell for. He steadily declined to 'tie up' the property in any way, but always reserved the right to sell to the first purchaser who applied and paid his price."

Instructions which impliedly assume the existence of evidence which was not given are erroneous. *Fisk* v. *Light Co.*, 3 Colo. App. 319, 33 Pac. 70.

The third instruction would make it the duty of an agent, in all cases, not only to find a purchaser, but to give him an introduction to the principal, and would deny him a right to recover without such introduction. In *Finnerty* v. *Fritz*, 5 Colo. 174, the court say that, "whenever it is made to appear that the agent is the procuring cause of the sale, the law leans to that construction which will best secure the payment of his commissions." Why an agent cannot be the procuring cause of a sale without formally introducing his client to his principal is past our comprehension. According to the plaintiffs, their sub-agent, Burns, found the purchaser; the employee of Burns picked him up, took him to the defendant, and made the bargain before the plaintiffs knew what was taking place; and as soon as they made the discovery, and before the money was paid, they notified the defendant that

they claimed their compensation. Assuming the truth of their statements, they were under no duty to introduce the purchaser, personally, to the defendant; and if it was through their instrumentality that their sub-agent's employee was enabled to bring the purchaser and seller together, and consummate the transaction, the defendant completing it with knowledge of their claim, they were entitled to the money. See *Williams* v. *Bishop,* 11 Colo. App. 378, 53 Pac. 239. This instruction imposed an unwarrantable condition upon the plaintiff's right of recovery.

Among the instructions given, the three to which we have called attention were prominent, and, in view of the evidence in the case, were necessarily injurious to the plaintiffs. As we have said, there was some evidence upon which a verdict for the plaintiffs might have been found, and the jury should have had a fair opportunity to say whether they believed it or not.

The judgment will be reversed.

Reversed.

[1]THE CALHOUN GOLD MINING CO. v. THE AJAX GOLD MINING CO.

(27 Colorado 1; 59 Pac. 607. Supreme Court. November 20, 1899.)

Stare decisis. A wrong decision of the court should not be followed unless it has been its rule of action so long, and relied upon to such an extent, that greater injustice and injury will result from a reversal, though wrong, than to observe and follow it.

Stare decisis in court not of last resort. Where the decision of a tribunal is subject to review by one having superior authority over it, for that purpose, or the same question may be passed upon by the superior tribunal in another case, the doctrine of *stare decisis* does not apply with full force till the question has been determined by the court of last resort.

The construction of an act of congress cannot be said to be authoritatively settled until passed upon by the supreme court of the United States.

Side veins prior to 1872. Before the act of 1872 the locator was confined to one vein, but by that act he becomes entitled to all veins apexing within his exterior lines.

[2]**The prior locator is entitled to all veins** which apex within the area of conflict with the junior location.

[3]**The junior locator has an easement** for right of way to follow his vein across the prior location for the purpose of the convenient working of his mine, but not for the purpose of taking any ore from within the surface boundaries of the prior location. *Branagan* v. *Dulaney*, 8 Colo. 408, overruled.

Blind and undiscovered veins. The statute giving to locators the right to all veins apexing within the surface lines applies to undiscovered as well as to discovered veins and whether the apex is within the boundaries at the surface or beneath the surface.

The right of a tunnel to the blind lodes cut on its line does not apply to such lodes where they have been previously enclosed within the exterior lines of a valid surface location.

[4]**A tunnel site has no right of way** to cross a mining location.

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[1]Affirmed, 182 U. S. 499; 21 M. R. —.

[2]*Book* v. *Justice Co.*, 17 M. R. 617.

[3]*Pardee* v. *Murray*, 15 M. R. 515. *Watervale Co.* v. *Leach*, 17 M. R. 568.

[4]*Richards* v. *Dower*, 64 Cal. 62. *Amador Co.* v. *Dewitt*, 73 Cal. 482; 15 Pac. 74.

[5]**Patent unimpeachable as to discovery.** As against a collateral attack, the action of the land department in issuing a patent to a mining claim is conclusive that all steps necessary to a valid location have been taken. In an action between a tunnel site locator and a prior lode locator, involving the right to a blind vein cut by the tunnel underneath the lode location, evidence offered by the tunnel locator to prove that at the time of the location of the tunnel no discovery of mineral in place had been made on the lode location was properly rejected.

A tunnel site locator is a trespasser in attempting to acquire title to the blind veins underneath a prior lode location and its motion for leave to develop the blind veins in its tunnel within the line of appellee's claim was therefore properly denied.

Appeal from District Court, El Paso County.

Action by the Ajax Gold Mining Company against the Calhoun Gold Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. E. SO RELLE, for appellant.

COLBURN & DUDLEY, and J. C. HELM, for appellee.

GABBERT, J. Appellee, the owner of the Monarch, Mammoth Pearl, Apex, and Champion lode mining claims, com-

[5]*See Uinta Co.* v. *Creede Co.*, 119 Fed. 164; 22 M. R. —.

The burden of proof is on the party alleging a crossing. *Lee* v. *Stahl*, 16 M. R. 152.

There must be two separate veins to make a crossing. *Lee* v. *Stahl*, *supra*. *Morgenson* v. *Middlesex Co.*, 11 Colo. 176; 17 Pac. 513. *Omar* v. *Soper*, 15 M. R. 496.

The surface cannot be entered to prove a crossing. *Atkins* v. *Hendree*, 2 M. R. 328. See also the text of U. S. R. S., § 2322.

Settlement between cross lode owners upheld although made in ignorance of their strict legal rights. *Coffee* v. *Emigh*, 15 Colo. 184; 25 Pac. 83.

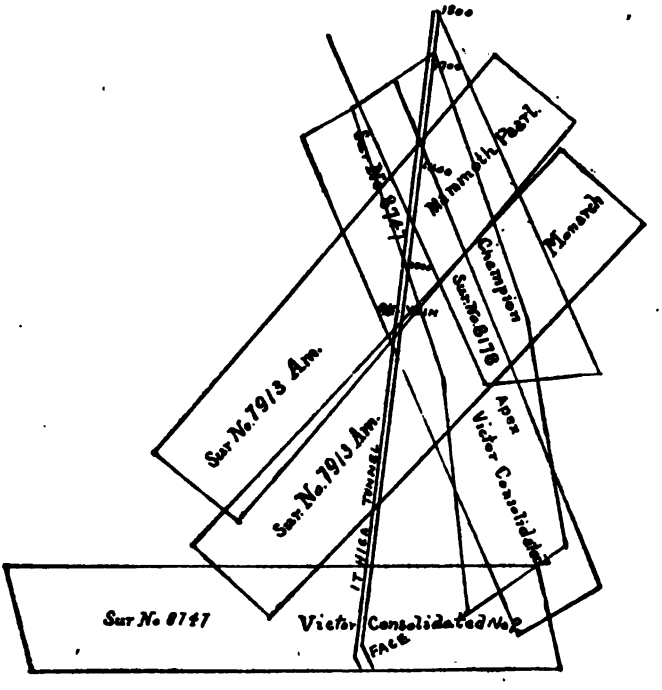
Grantor cannot claim the right of crossing through the ground he has conveyed. *Stinchfield* v. *Gillis*, 18 M. R., 195.

A location cannot be made on top of a prior location on the pretext of its being a crossing. *Book* v. *Justice Co.*, 17 M. R. 617.

menced this action in the court below to recover damages, and restrain appellant, as defendant, from removing ore claimed to be within the boundaries of these claims, and to which it asserted it was entitled by virtue of such ownership; and also to restrain defendant from prosecuting work upon a tunnel which the latter was excavating underneath such claims. Defendant answered, justifying its removal of ore and excavation of the tunnel upon two grounds: (1) That it was the owner of the Victor Consolidated claim, the vein of which crossed each of those embraced within the claims of plaintiff. (2) That it was the owner of the Ithica tunnel site, projected across these claims, by virtue of which it was entitled to extend a tunnel underneath them; that in prosecuting work thereon it had penetrated the claims of plaintiff, and discovered, located, and claimed numerous blind veins underneath the surface of such claims; that it had also cut the vein of its Victor Consolidated claim in this tunnel underneath the surface of plaintiff's claims, and removed ore therefrom of the value of $400; and that it claimed to be entitled to excavate and run this tunnel for the purpose of discovering such blind veins, to work and remove ore therefrom, and from its Victor Consolidated vein. By stipulation, the Champion was dropped from the case. Upon the issues made by the pleadings, the facts thereby admitted, a stipulation as to those controverted, and certain documentary evidence, the cause was tried to the court, which resulted in a judgment adjudging plaintiff to be the owner in fee of each of its lode claims in controversy in their entirety as patented, and, *inter alia,* with respect to veins, "together with all veins, lodes, or ledges having their tops or apexes therein, and including all that portion of the said Victor Consolidated vein within the side and end lines of the plaintiff's said claims extended downwards vertically;" for damages in the sum of $400; and also enjoining defendant from prosecuting work upon or extending its tunnel underneath the claims of

plaintiff; and, with respect to removing ore, enjoined defendant (employing the language of the judgment) "from further taking out, extracting or removing ore, by means of said tunnel or otherwise, from within the side and end lines of plaintiff's said claims extended downward vertically."

From this judgment the defendant brings the cause here on appeal.



The controversy over the right of appellant to extend its Ithica tunnel is from the point where it enters the Monarch on the southerly side, and thence across the claims of plaintiff. The blind leads discovered are in that portion of the tunnel between the point where it enters plaintiff's claims on the south and the breast of its excavation. The vein of the Victor Consolidated is also cut in this tunnel at point

marked "961." The conflict in the lode claims of the respective parties is included in the territory bounded by the south side line of the Monarch, the north side line of the Mammoth Pearl, and the side lines of the Victor Consolidated between these two lines. The reproduction of the plat (page 195), which the parties stipulated below was correct, showing the relative location of the respective properties over which this controversy arises, will materially aid in understanding the questions involved.

We are relieved from stating the pleadings to any considerable extent, or determining the questions of law thereby presented, because on the trial below it was stipulated that the following are involved:

"First. Whether or not the Ithica tunnel, in such pleadings described, is entitled to a right of way through plaintiff's lode claims.

"Second. Whether or not defendant has acquired, by virtue of said tunnel and tunnel-site location, the ownership and right to the possession of the blind veins cut therein, to wit, veins or lodes not appearing on the surface, and not known to exist prior to the date of location of said tunnel site.

"Third. Whether or not defendant is the owner and entitled to the ore contained in the vein of its Victor Consolidated claim within the surface boundaries, and across plaintiff's lode claims.

"Fourth. Whether or not the defendant may in this cause introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims of plaintiff prior to the location of said tunnel site."

From the pleadings, evidence, and stipulation of the parties, the facts established, so far as material to the controverted questions of law involved, are: That each of appellee's claims was located prior to either the lode claim or tun-

nel site of appellant; that the receiver's receipt on each of the claims of appellee issued prior to the location of the tunnel site, and prior to the issuance of receiver's receipt on the Victor Consolidated; that the patents upon the lode claims of appellee issued prior to the patent on the lode claim of appellant; that the patent to the Apex issued prior to the location of the tunnel site, and on the Mammoth Pearl and Monarch subsequent to such location; that the vein of the Victor Consolidated was discovered and located from the surface, was not known to exist prior to such discovery, extends throughout the entire length of that claim, and on its strike crosses each of the veins in the claims of appellee upon which they were respectively discovered and located; that the tunnel cuts numerous blind veins underneath the surface of the claims of appellee, which do not appear upon the surface, and were not known to exist prior to the location of the tunnel; that the vein of the Victor Consolidated was cut in this tunnel underneath the claims of appellee, and ore of the value of $400 removed therefrom. It also appears that the patents upon the lode claims of appellee embrace the conflict with the Victor Consolidated without any reservation as to either surface or veins, and in this respect conform to the receiver's receipts upon such claims; that the patent on the Victor Consolidated excludes the surface in conflict with the claims of appellee, and all veins having their apex within such conflict, which are the same exceptions contained in the receiver's receipt for that claim; that the portal to the Ithica tunnel site was, at the date of its location, on public domain; that work thereon was prosecuted diligently, and that the location of such tunnel was in all respects regular; that all necessary steps were taken by appellant to locate the blind veins cut in such tunnel, which are in controversy in this case; that the record titles of the claims of appellee are vested in it, and the record titles of the Victor Consolidated, the Ithica tunnel site, and blind veins discovered therein

underneath the claims of appellee are vested in appellant. The record discloses that appellant offered testimony tending to prove that at the date of the location of its tunnel site mineral in place had not been discovered on the Monarch and Mammoth Pearl lode claims. The rights of the parties depend principally upon a construction of the following sections of the Revised Statutes of the United States:

"Sec. 2322. The locators of all mining claims heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins, lodes, or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

"Sec. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

"Sec. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The main questions presented for our determination for convenience we summarize as follows:

(1) Is appellant the owner and entitled to the ore contained in the veins of its Victor Consolidated claim, within the surface boundaries of appellee's lode claims?

(2) Has appellant acquired, by virtue of its tunnel site location, the ownership and right of possession to the blind veins cut therein underneath appellee's claims, and is its tunnel entitled to a right of way through the lode claims of appellee?

(3) Should appellant have been permitted to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims of appellee prior to the location of the Ithica tunnel site?

All these were answered in the negative by the court below.

The first question presented involves particularly a construction of section 2336, *supra*. The rights of a junior location to the ore of its vein embraced in the conflict with a senior have been determined by this court in *Branagan* v. *Dulaney*, 8 Colo. 408, 8 Pac. 669, and in several subsequent cases which have adopted the doctrine announced in that case on this subject; and, if we adhere to the law as announced in those cases, then the rights of appellant to the ore in the vein of the Victor Consolidated included in the territory of that claim conflicting with that of appellee are fixed and settled, for under those decisions it would be en-

titled to all this part of its vein, except where it intersects the veins of appellee's claims. It is contended by counsel for appellee that the ruling in *Branagan* v. *Dulaney* and cases following it is wrong, and that this question should now be reconsidered. In opposition to a reconsideration of the rights of cross-lode claimants, as declared by those cases, it is urged that the doctrine of *stare decisis* applies, and, even if wrong, should not now be disturbed, because the rule therein announced has been established for such great length of time as to become a settled rule of property in this state. We are aware of the gravity of reversing a long-established precedent, and realize that it should not be disturbed except for the most cogent reasons; that the people of this commonwealth have a right to presume that, when a question has been once settled by this court, its decision is correct, and that all may rely upon it. We understand, generally, that when a decision has established a settled rule of property, upon which rights are predicated (and especially those relating to real estate), the law will be adhered to by the court announcing it, and those bound to follow its adjudications, even if erroneous (Black, Interp. Law, § 152); but this rule is not inflexible. Courts are not bound to perpetuate errors merely upon the ground that a previous erroneous decision has been rendered on a given question. If it is wrong it should not be continued, unless it has been so long the rule of action, and relied upon to such an extent, that greater injustice and injury will result by a reversal, though wrong, than to observe and follow it. Black, Interp. Law, *supra;* Suth. St. Const. § 316; *Boon* v. *Bowers,* 30 Miss. 246.

The law as announced in *Branagan* v. *Dulaney* has led to much confusion, and has been a fruitful source of litigation. Under it doubts have been cast upon titles to mining properties, and supposed rights reduced to uncertainties. Judging by the experience of the past, coupled with the knowledge of the present great activity in mining, to some extent caused,

perhaps, by the marked improvement in mining and the reduction of ores, this industry is comparatively in its infancy in this state; and, if the rule regarding cross leads as announced by this court is wrong, it will result in more injury in the future to perpetuate it than will temporarily be caused by its reversal. It is a matter of common knowledge that ever since the decision of this court on that question its correctness has been doubted by many eminent members of the bar of this state familiar with mining law, and has even been the subject of expression to that effect by this court—*Argonaut C. M. Co.* v. *Turner,* 23 Colo. 400, 48 Pac. 685,—in which it was said, in speaking of the rights conveyed by patent to a mining claim, that it conveys all lodes or veins having their apexes within the boundaries of such claim, except, perhaps, cross lodes. This doubt has been generally entertained by those engaged in mining, so that, notwithstanding the length of time which has elapsed since the rendition of the first decision of this court on this question, it is safe to assume that it has not been implicitly relied upon as sound exposition of the law relating to cross leads, and that, in the great majority of instances, parties have governed themselves accordingly.

The law construed in *Branagan* v. *Dulaney* is an act of congress. The doctrine of *stare decisis* is based upon the assumption that the rules of law to which this doctrine applies have previously been determined by a court having final jurisdiction of the questions involved. For this reason, where the decisions of a tribunal are subject to review by one having superior authority over it for that purpose, or the question determined may be passed upon by such tribunal in another case, the doctrine of *stare decisis* does not apply with full force until the same questions have been determined by the court of last resort. The construction of an act of congress cannot be said to be authoritatively settled until passed upon by the highest court authorized so to do. This

is the supreme court of the United States. It has never decided the question regarding cross veins as presented in the case at bar. The decision of this court on that question may be reviewed by that tribunal; so that, although this court has given the statutes affecting cross lodes a construction which has since been followed in this state, nevertheless, as these same statutes are still open to construction by the highest tribunal of the land, their meaning on the subject of cross leads as involved in this case has not been finally determined, so as to become *stare decisis*. In Arizona, California, and Montana a different construction regarding the rights of cross lode claimants has been given from that announced by the supreme court of this state. *Watervale M. Co.* v. *Leach* (Ariz.) 33 Pac. 418; *Wilhelm* v. *Silvester*, 101 Cal. 358, 35 Pac. 997; *Pardee* v. *Murray*, 4 Mont. 234, 2 Pac. 16.

Whether or not the reasons given for this conclusion are sound is not material. Sooner or later this question must be determined by the supreme court of the United States, and when it is the law thus settled must be followed by all the courts of the states and territories in which the act in question is in force. For these reasons we conclude that, although this court has passed upon the identical question regarding cross veins now involved, it is not precluded from again considering it, under the doctrine of *stare decisis*, or that the law as announced by this court in previous cases has become a settled rule of property in this state; and if, upon a reconsideration of such question, we conclude that our previous decisions thereon were wrong, we should not wait for a superior tribunal to so declare.

Before proceeding, however, with a discussion of this question, we suggest that, were it not for the expression in *Argonaut C. M. Co.* v. *Turner*, *supra*, the action of the trial court in refusing to follow *Branagan* v. *Dulaney* would certainly be subject to criticism.

Previous to the act of 1872 relating to mining claims,

which, with a few modifications, has been in force ever since its passage, the rights of a locator were practically limited to the vein upon which his location was made. That was the thing granted. The rights to surface ground only attached for the purpose of the convenient working of the vein so located. No rights to any other vein except the one upon which the location was made were given. Under the law then in force, the surface ground, with the vein located, varied—controlled as it was, in a great measure, by local rules, or, in their absence, by the judgment of the land department in each particular case—as to the area necessary for the convenient working of the mine; so that, as might be expected, the patents issued under the law prior to the act of 1872 embrace surface areas different and irregular in form. By this latter act a marked change was effected. The surface area which could be controlled by one location was definitely fixed, and, this area being extensive, it was necessary that rights therein should be definitely declared. The rights of the locator to the mineral which might exist underneath such surface area was no longer limited to the one vein upon which he made his location. By section 2322, *supra,* it is expressly provided that from and after the passage of the act of which it forms a part the locators of all mining claims theretofore or subsequently made, to which no adverse rights had attached on the 10th day of May, 1872, upon compliance with the laws and regulations governing their title shall have the exclusive right of possession and enjoyment of the surface included within the lines of such locations, and of all veins throughout their entire depth apexing inside of such surface lines extended downward vertically, although such veins might so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines. This section, standing alone, would seem to be clear, explicit, and unambiguous. It provides a test by which the right of a locator to a vein inside of the lines of his location

extended downward vertically should be determined, namely, if the top or apex of a lode was within the boundaries of his claim, as above designated, then he should be the exclusive owner thereof; provided, of course, that no adverse rights thereto existed at the date of his location.

It is claimed by counsel for appellant that this section by implication excepts cross veins, because no extralateral rights are given such veins, such rights being measured by the end lines of the claim extended in their own direction, and, as cross veins would not intersect these lines, no extralateral rights would attach to such veins. That question is not involved in this case. Appellant is making no claim to any portion of the veins in controversy by reason of extralateral rights; and, besides, the vein of the Victor Consolidated is given no such rights, because by the judgment, appellee is only declared to be the owner of that portion of the vein within the boundaries of its claims extended downward vertically. The most that can be said for this section, on account of its phraseology, is that cross veins are not given extralateral rights; and yet we can conceive of a location where a cross vein upon its strike may cross the one upon which the location is made, and intersect both end lines. But granting, for the sake of argument, that veins crossing the one upon which the location is made have no extralateral rights (but upon that question we express no opinion), this would only operate as a limitation as to such rights, and not as to others which would attach by virtue of a location, for naming limits of a grant is not equivalent to saying that nothing is granted which does not extend to those limits. *Del Monte M. & M. Co.* v. *Last Chance M. & M. Co.*, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 55. It is by virtue of section 2336 particularly that counsel for appellant contend that the portion of the vein of the Victor Consolidated in controversy belongs to the latter, their position being that by this section cross veins are excepted from the operation of

section 2322. It is the section construed in *Branagan* v. *Dulaney*. The rule adopted by the court in construing it in that case is an arbitrary one, and never resorted to except in cases where the different sections of an act are in conflict, namely, "as between conflicting sections in the same statute, the last in order of arrangement will control," and, applying this doctrine, reached the conclusion that under section 2322 the locator of a claim acquired no rights to cross veins apexing within the limits of his location.

The rule above announced is only applicable when there is an irreconcilable conflict between the different sections of the same act, and no reasonable construction will harmonize the parts; but, as the two sections under consideration do not conflict in all their terms, the real question presented in construing them is, does the latter qualify the former? It is presumed that each section is intended to co-act with every other of the act of which it is a part, and that no one is intended to antagonize the general purpose of the enactment. Suth. St. Const. § 160. It is also a rule that, in order to ascertain the legislative intent, every section of an act is to be construed; that it is to be construed as a whole (Id.; *Parkinson* v. *State*, 74 Am. Dec. 523); and that construction which renders the whole act harmonious, and gives effect to every clause and part, is to be favored (23 Am. & Eng. Enc. Law, 309; *Brooks* v. *Commissioners*, 31 Ala. 227; *People* v. *Burns*, 5 Mich. 114; *Patterson* v. *Spearman*, 37 Iowa, 36).

In *Branagan* v. *Dulaney* it was assumed that the "space of intersection" meant the intersection of the veins of conflicting cross locations, and, as the mineral in this space was given to the prior location, and none other, that, therefore, the junior locator of a cross lead had all the ore of his vein within the space of intersection of the conflicting locations, save at the space where the veins intersected. Section 2336 does not purport to provide for the location of cross veins over territory included within a prior valid and subsisting

location. Its purpose appears to be to fix the rights of the claimants of such veins, to settle what might otherwise be conflicting rights between claimants of veins crossing or intersecting each other, and provide easements for the benefit of the claimants of such veins (*Wilhelm* v. *Silvester, supra*); and unless, in making such provision, it impliedly gives the junior cross claimant the ore of his vein, except at the point where it intersects the vein of a senior location, the doctrine announced in *Branagan* v. *Dulaney* cannot be upheld; so that, in order to determine what rights are conferred upon a junior cross claimant under this section, the real question is, what is meant by the "space of intersection?"

The words employed in a statute are to be construed with reference to its subject-matter and the objects sought to be attained (23 Am. & Eng. Enc. Law, 322; *Brewer's Lessee* v. *Blougher,* 14 Pet. 178, 10 L. Ed. 408; Sedg. St. & Const. Law, 359), as well as the legislative purpose in enacting it; and its language should receive that construction which will render it harmonious with that purpose, rather than that which will defeat it. (Id. 319; *Taylor* v. *Board,* 67 Ind. 383; *People* v. *Lacombe,* 99 N. Y. 43, 1 N. E. 599). When ambiguous, its general intent, as gathered from the statute, furnishes a key by which its ambiguities may be solved, and thus its words given that meaning which will harmonize with that intent. Suth. St. Const. §§ 218, 219. Conditions with reference to the subject-matter of the act, which it is apparent from its context it was necessary to provide for, may also be considered in ascertaining what is meant by that which is apparently ambiguous. *People* v. *Lacombe, supra.* It is evident from the provisions of section 2322 that the intent of congress was to give to the locator of a claim to which no adverse rights had attached every vein apexing within the surface boundaries of his location, unless its intent is negatived by section 2336. The words "intersect" and "cross," as used in this section, are not strictly synonymous, and, in using both

it must be presumed, intended to provide for different conditions. Veins might intersect, either on their strike or dip, and not cross. In that event it was necessary to provide which location should have the ore at the space of intersection, and it was declared that the prior location should have the ore within that space. In case they crossed, then a further provision was necessary, and it was provided that the junior locator should have the right of way through the space of intersection for the convenient working of his mine. From a casual reading of this section it might be inferred that the "space of intersection" meant the intersection of the veins, but that does not necessarily follow, when its meaning, as ascertained by one or more of the canons of construction which may be invoked, is ambiguous, or different conditions exist which would control its import, or if, by giving it that limitation, the section in which it occurs conflicts with other portions of the act. Previous to May 10, 1872, as before noticed, no rights attached to any vein except the one upon which the location was made. All rights which had attached previous to that date were in no manner disturbed. Rev. St. U. S. §§ 2322, 2344. In case of conflicting cross locations made prior to that date each locator would hold the vein located upon up to the point where they intersected on their strike. It was necessary to settle which should have the ore within the space of intersection of such veins, and, if they crossed, what further rights the junior locators should have. This was done. In such case intersection would clearly mean the intersection of the veins. In case of locations made under the act of 1872, or prior to that date, which were substantially parallel, the respective veins in each might either intersect or cross upon the dip, in which event it would be necessary to provide which should be entitled to the ore within the space of vein intersection; and here again the meaning of "space of intersection," or the subject to which it refers, is the intersection of the veins. Again, under the conditions

last noticed, the veins might unite, and to provide for this contingency it was declared that the prior location should take the vein below the point of union, including all the "space of intersection," which in that instance also refers to the intersection of the veins.

It may be urged that the construction thus far of this section is in conflict with section 2322, for the reason that under the latter the ownership of the space of intersection would depend upon which vein filled that space. Granted that this may be true, then we must invoke the rule that an act must be construed as a whole; and, if the construction of section 2336 so far given modifies section 2322, it is not violating any rule applicable to the construction of different sections of the same act, which apparently conflict. This construction, however, does not cause any conflict between the two sections. The former gives to the locator the veins to which his rights attach throughout their entire depth, and if upon their strike (limiting the latter to rights which vested prior to the 10th day of May, 1872), or in descending into the earth, a body of ore bounded by the foot and hanging walls of his veins extended in their general course has been intruded from another source, or if in descending they unite with other veins, these are not reasons why he should not be the owner of such spaces of intersection, or enlargements of his veins, caused by intersecting or uniting with others, but, on the contrary, according to the terms of section 2322, he should be; provided, of course, that his title is prior to that of the location of the veins intersecting or uniting with his. So that the construction of these sections under the conditions noted renders them harmonious, and section 2336 simply recognizes that in conflicts in such cases priority of title should govern,—a test which is clearly in harmony with section 2322, and limits the provisions of section 2336 thus far to easements only. It may also be said that an easement would exist in favor of a junior claimant to follow his vein

through the space of intersection caused by veins crossing upon their dip, because by section 2322 the locator is entitled to follow a vein in its course into the earth outside the vertical side lines of his location. This may be true, but as to veins crossing on their strike no such right is impliedly given by that section, and, as we have endeavored to demonstrate, such a right was necessary under conditions above noted. In case of locations made subsequent to the act of 1872, which cross each other, or those made under that act which likewise conflicted with locations made prior to the date it took effect, it was also necessary to provide for possible conditions, namely, the respective rights of the claimants of such locations within the conflict of their claims, and particularly for a right of way for the junior claimant; and the vital question now to determine is what is meant by the "space of intersection" in such cases as employed in section 2336, and which party would own the ore of the vein of the junior location within that space. We again reiterate that the clear intent of section 2322 was to give the locator of a claim to which no adverse rights were in existence at the date of his location all veins apexing within its surface boundaries. That eminent jurist, Mr. Justice Brewer, with his extended experience in mining litigation, certainly spoke advisedly in *Del Monte M. & M. Co.* v. *Last Chance M. & M. Co., supra* (although the precise question now being considered was not there presented), when he said, in speaking of the rights of a locator under the provisions of this section: "Every vein whose apex is within the vertical limits of his surface lines passed to him by virtue of his location. He is not limited to only those which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines." To the same effect is the language employed in 101 Cal. 358, *supra*. By that section he has been given title to all such veins. Such being the

case, was it intended by section 2336 to modify that grant, or vest title in a cross claimant to any part of a vein apexing within the boundaries of a prior valid location, and, especially, what rights were intended to be granted or fixed under the conditions now being considered?

It provides that in such cases priority of title shall be the test by which the ownership of the ore at the space of intersection shall be determined. That is in accord with the rights conferred by section 2322. So stating, however, is not equivalent to a grant. That language does not import that an exception is carved out of an estate which has already passed. Under the facts now in mind, the senior locator, by virtue of section 2322, would own the ore of the junior cross vein within the boundaries of his location; and, before that right could be divested under section 2336, it must appear from the wording of the latter that such right is thereby expressly excepted. That the language of this section is not susceptible of the construction that creates such an exception, it seems to us is clear, when we bear in mind that which we have already stated,—that it does not pretend to deal with the location of cross veins over senior valid locations, but the purpose of which was to provide for easements, and settle rights which otherwise might be doubtful, or the subject of controversy, without some further declarations than those contained in section 2322; and so we conclude that, to render the two sections harmonious, the "space of intersection," as used in section 2336, when applied to the facts now being considered, means the intersection of the claims. Barring. & A. Mines & M. 472, 473.

Under section 2322 no rights were given the owner of a location crossing a prior one to invade the latter for any purpose in following his vein upon its strike. This was an important matter. Without such right, a portion of his claim might be rendered valueless. But, if the expression "space of intersection" is limited to the intersection of veins

as the space through which he should have a right of way for the convenient working of his mine, it would be of no avail, for he would have no right under which he could reach that easement; and so again, in order to recognize one which would be of any value to the junior cross claimant, the space of intersection must also mean the intersection of the claims. Morrison's Mining Rights (9th Ed.) 115. The learned author of the work just cited, in treating the subject of title to ore included in the space of intersection as between conflicting cross locations under section 2336, gives the following cogent reasons why, in his opinion, as between such locations, the owner of the junior has a right of way through the senior, but no right to the ore of the claim which he crosses:

"It was within the power of congress by a subsequent clause to have made the crossing lode an exception carved out of the general grant of the words of the previous section, but has it attempted so to do? The only grant of section 2336 is the right of way, which of itself implies that it is not a grant of the vein, but of an easement, to which the estate of the prior location is made servient."

"To give any part of the space of intersection to the holder of the later location would be to take from the older location something already granted to it. To create an exception out of his grant as he originally takes it, under act of congress, would require in the wording of the act expressions as strong as are required to create an exception in a deed. An exception is equivalent to the reconveyance of land already conveyed. A right of way is not an exception, but a reservation, which may be inferred from any wording indicating an intention to create an easement. It takes nothing from the body of the grant of the first locator, but compels the first locator to use or hold his grant or claim subject to a right or privilege to the junior or overlapping claimant of reaching the other end of his claim by passage through the senior location."

Under the conclusion reached in Arizona, California, and Montana in the cases above cited, the ore within the space of overlapping claims would belong to the owner of the senior location. In the Arizona case that conclusion was reached upon the ground that the expression "space of intersection" meant intersection of the veins; that they might so intersect upon either their strike or dip; but, as to the former, it was limited to locations made prior to the 10th day of May, 1872. The learned judge who wrote the opinion in that case appears to have given it careful consideration, but, in seeking to harmonize the two sections, it seems to us, fell into the error of (1) holding that the space of intersection meant intersection of veins only; (2) imposed a limit upon the provisions of the section when he announced that it only applied to the intersection of veins upon their strike, under locations made prior to May 10, 1872, which is not warranted, either expressly or by implication; and (3) by so doing necessarily deprived a junior location, made under the act of 1872, of the right of way across a senior location, if the former crossed the latter. In the California case the eminent jurist who wrote the opinion seems to have entertained similar views regarding the application of this section to rights which vested prior to May 10, 1872, but, except as to those rights, inclined to the conclusion that this section only referred to the intersection of veins upon their dip, which would also result in depriving a junior cross claimant of a most important right. We think that Chief Justice Beatty, who concurred in the opinion in that case, more nearly announced the true doctrine when he said:

"I think, however, that too much is conceded, both in the opinion of the court and in the argument of counsel for respondent, in assuming that the provisions of section 2336 cannot be applied to locations made since the passage of the mining law of 1872 on veins which intersect upon their strike, without bringing it in conflict with the plain terms of

section 2322. This wholly unwarranted assumption has been the source of all the trouble and difficulty which the land office and some of the state courts have encountered in their attempts to construe provisions of a statute which are in perfect harmony, but which have been erroneously supposed to be inconsistent."

The opinion in the Montana case is not altogether clear, but seems to limit the space of intersection, as applied to the facts there presented, to the intersection of the conflicting claims, but does not enter into a discussion of the subject; so that, although we agree with the conclusion reached in each of those cases, we cannot accept the limitations imposed upon the provisions of this section, or indorse the reasons advanced by the learned writers of the opinions in the Arizona and California cases.

Our conclusion is that the provisions of section 2336 apply to locations made under the act of 1872 as well as before; refer to the intersection or crossing of veins either upon their strike or dip; that the space of intersection, in determining the ownership of ore within such space, means either intersection of veins or conflicting claims, according to the facts in each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins (underneath the surface) which he owns or controls outside of that space. This construction renders the two sections entirely harmonious, gives effect to every clause and part of each, and, in so far as section 2336 regulates or in any manner provides for rights as between conflicting claims, it applies only to intersections consistent with all the provisions of section 2322.

As we understand the rulings of the land department in issuing patent for conflicting mining claims, there is always excepted from the surface of the junior that portion conflicting with the senior, as well as all veins apexing within such conflict. This practice is in accord with our views, and,

although such a construction would not be controlling, the interpretation put upon the act by those whose duty it has been to construe, execute, and apply it is entitled to much weight. 23 Am. & Eng. Enc. Law, 339; *Frost* v. *Pfeiffer,* 26 Colo. 338, 58 Pac. 147; *People* v. *Le Fevre,* 21 Colo. 218, 40 Pac. 882.

The receiver's receipt, as well as the patent issued appellant excepted therefrom all veins apexing within the conflict between its claim, the Victor Consolidated, and those of appellee. The patents to the latter granted all such veins, and thus all rights attaching by virtue of priority of location have been preserved to appellee. The location of the Victor Consolidated was junior to that of the claims of appellee, and from this fact, and the views expressed, it follows that appellant cannot complain of the judgment of the lower court in so far as it awards to appellee the vein of the Victor Consolidated, and all veins apexing within the boundaries of the claims of the latter, and awarded damages for the removal of ore. These views are in conflict with the case of *Branagan* v. *Dulaney,* and that case, as also those of this court following it, in so far as they conflict with the doctrine now announced regarding conflicting cross claims, are overruled. The language of the judgment of the lower court regarding the rights of appellant in the conflicting territory is very explicit, but only extends to acts of trespass, and does not prohibit those which it may exercise therein by virtue of its ownership of the Victor Consolidated claim.

The determination of the second question presented involves a construction of section 2323, *supra.* The contention of counsel for appellant is that in all patents for lode claims, blind leads are excepted, and that the patentee takes no title thereto by virtue of patent. In answer to this, we have only to advance one step further in the construction of section 2323, and call attention to the fact that the test there applied by which the ownership of veins embraced in a valid, sub-

sisting location is determined, is that they apex within the boundaries of his claim extended downward vertically, without regard to where such apexes may be with reference to the surface, so that again the question presented is, does section 2323 conflict with, or in any manner modify, the provisions of section 2322, and in construing them the same rules must be observed relative to the construction of an act containing different sections that have already been invoked. The former provides what rights may be acquired to blind veins discovered in a tunnel run for the development of the vein or for the discovery of mines, but upon what ground may such tunnel be run, or within what territory must the blind leads discovered therein be located, in order to give the discoverer any rights thereto? A valid location of a mining claim, so long as it is in full force and effect, operates as a bar to a second location of the premises so claimed. *Belk* v. *Meagher,* 104 U. S. 279, 26 L. Ed. 735; *Gwillim* v. *Donnellan,* 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; *Del Monte M. & M. Co.* v. *Last Chance M. & M. Co.,* 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 55. The only exception is that a given location leaves open to others such rights therein as do not attach by virtue of such location; in other words, that a location only carries with it such rights as it is entitled to under the law by virtue of which it is made, and that rights not attaching are reserved to others. It is upon this ground that appellant contends that its rights to the blind leads in question attach; that is, that under section 2323 these veins are impliedly excepted from the locations and patents of appellee's claims. If such a conclusion can be deduced from the sections under consideration, they are hopelessly in conflict, for, first, there is granted all veins the ownership of which is determined in the manner we have designated, including blind, and then, immediately following, the grant to the latter is withdrawn. A location can take no rights which conflict with a prior valid one, so long as it

is kept alive. The law contemplates, and the authorities recognize, that the very life of a mineral location depends upon the fact that it is made upon unappropriated mineral domain; and, with the one exception already noticed, this requirement extends to the entire location,—that is, it cannot embrace any ground, nor can it initiate any rights, within the boundaries of a prior valid, subsisting location, except those reserved from the latter. This rule extends to all classes of mineral locations; in other words, priority determines the rights between conflicting locations. The tunnel of appellant was commenced upon ground open to location, but at the time it was located, and work thereon commenced, the ground embraced within the claims of appellee had already been located and claimed as lode claims, so that the rights of appellee to the ground within the boundaries of its claims, and the leads in question, had attached before appellant attempted to initiate any title thereto, and therefore none attached by virtue of the location of or work upon its tunnel site, unless it appears that by virtue of section 2323 a tunnel for the discovery of blind leads may be projected across and extended into prior valid, subsisting locations, and title to the blind leads discovered within the boundaries of such claims thus be secured. It provides how inchoate rights to blind veins may be initiated; how they may become absolute; but nowhere does it in terms, either expressly or impliedly, declare that for these purposes it may be projected into or across prior valid locations. To give it the interpretation that it does is to inject a meaning of which it is not susceptible, renders it irreconcilable with the provisions of the section preceding, and overthrows the doctrine of priority,—the foundation upon which mining rights rest. It does not provide that under a location for tunnel-site purposes a right is granted to search for minerals in lands belonging to another, or that thereby a location for such purposes can be carved out of appropriated public domain; while limiting it

to locations for tunnel-site purposes to ground not previously appropriated renders it harmonious with section 2322. That the latter was the clear meaning and intent of congress in passing the act of which these two sections form a part is apparent from the further reading of section 2323, which in terms provides that locations, on the line of the tunnel contemplated by this section, of veins not appearing on the surface, made by others after the commencement of work thereon, and while it is being prosecuted with reasonable diligence, shall be invalid,—a clear recognition of the controlling principle of priority. Counsel for appellant assert that *Enterprise M. Co.* v. *Rico-Aspen Con. M. Co.,* 167 U. S. 108, 17 Sup. Ct. 762, 42 L. Ed. 96, and *Ellet* v. *Campbell,* 18 Colo. 510, 33 Pac. 521, affirmed in 167 U. S. 116, 17 Sup. Ct. 764, 42 L. Ed. 101, are authority for their propositions that blind leads are excepted from all locations and patents; that no rights to such leads attach until discovered; that a tunnel site may be projected across, and its tunnel extended underneath, previous valid, subsisting locations, and title to blind leads discovered in such tunnel within the boundaries of such claims, not known to exist previous to the commencement of work thereon, may be thus acquired by the owner of such tunnel. Neither of such cases so holds, and, while they cannot be said to be directly in point, because the facts in the case at bar and those are entirely different, yet by analogy the principle upon which the right to blind leads discovered and located under the section of the statute relative to tunnel sites which was applied in those cases is the same as that upon which we base our decision here, viz., priority of location; for in each of those cases the tunnel site was located prior to the date of the location of the lode claims within the territory embraced within the tunnel site location, and within the boundaries of which the blind leads were discovered and located which were the subject of controversy. It was upon this ground, as we read and understand the opin-

ions in these cases, in connection with the facts, that the inchoate rights of the tunnel claimants to such leads were predicated, and by virtue of which, when discovered on the line of the tunnel, they became absolute.

On the subject under consideration one further question needs to be determined, namely, has appellant a right of way for its tunnel through the territory of appellee? It is contended by counsel for appellant that under section 2338, Rev. St. U. S., and section 3141, Mills' Ann. St., it is entitled to such right. The first of these sections provides that, in the absence of necessary legislation by congress, the legislature of a state may provide rules for working mines involving easements, drainage, and other necessary means to their complete development, and that these conditions shall be fully expressed in the patent. The section of Mills referred to provides that a tunnel claim located in accordance with its provisions shall have the right of way through lodes which may lie in its course; but it will be observed that this section only refers to tunnels located for the purpose of discovery, and, if any of its provisions are still in force,—which appears to be doubted in *Ellet* v. *Campbell, supra,*—they can have no application to the case at bar, because the section of the Revised Statutes only provides for easements for the development of mines, and the section of Mills relied upon does not attempt to confer any such rights, but is limited to the one purpose of discovery. In this respect it has been clearly superseded by the act of congress; so that, if appellant is entitled to the right claimed, it must attach by virtue of some provision of this act.

Mining rights are statutory, but not purely so. They relate to real estate, and such rights as are not defined or limited by statute are still controlled by the rules of the common law. Such rights as are conferred by a valid prior location, so long as it remains in full force and effect, are preserved from invasion, and cannot be infringed upon or im-

paired by subsequent locations (Lindl. Mines, §363), and are as fully protected under the rules of the common law as any other classes of real estate. Under the statutes the subsequent locator has no right to penetrate a senior valid, subsisting location underneath its surface boundaries extended downward vertically, except for the purposes specified in the mining laws. We will not undertake to specify what these exceptions may be, but, so far as they are not fixed by statute, the possession and enjoyment of the ground underneath the surface of a valid, subsisting location cannot be invaded. These exceptions do not include a right to drive a tunnel through such a location for the purposes of discovery.

We are not aware that the precise questions presented for our determination, which we have designated as proposition second in the former part of this opinion, have ever been passed upon by an appellate court. In the case of *Stratton* v. *Gold Sovereign M. & T. Co.*, 1 Mills, Leg. Adv. 350, in which case complainant brought an action to restrain defendants from extending a tunnel through the claim of the former, which had been located prior to the date of the tunnel site, the defendants answered that they were driving such tunnel for the avowed purpose of discovering and claiming blind veins within the territory of complainant's claims. Complainant applied to Judge Hallett for a temporary injunction, which he granted, and, in the course of his opinion, said:

"Chapter 6 of the Revised Statutes provides for three kinds of locations on the public mineral lands, which, in common speech, are called 'lode locations,' 'tunnel locations,' and 'placer locations.' When a location has been properly made in either class, and so long as it shall be fully maintained by use and enjoyment, or by patent, the territory embraced in such location is not subject to adverse location by a claimant of the same class or any other class. The reason is that the territory covered by such location has been severed

from the public domain, and has become private property, which is no longer open to a new appropriation."

Our construction of section 2323 is that a tunnel site can only embrace unappropriated public domain, and that under it no rights are conferred to extend a tunnel through previous valid, subsisting locations. From the record before us, appellant had no right to invade the premises of appellee through its tunnel, and, in the absence of any proof to the contrary, the presumption attaches that all veins discovered in that part of its tunnel under appellee's claims belong to the latter (*Wakeman* v. *Norton,* 24 Colo. 192, 49 Pac. 283); and the judgment of the court that appellee was the owner of these veins, and enjoining appellant from further extending its tunnel into or using that portion of it under the claims of appellee, is correct.

The final question passed upon by the trial court under the stipulation relates to the offer of appellant to prove that at the time of the location of its Ithica tunnel site no ore had been discovered in the Monarch and Mammoth Pearl. This offer was denied. At the time the tunnel site was located, and work commenced thereon, receiver's receipts had been obtained for these claims, upon which patents subsequently issued. These evidences of title took effect by relation as of date of the location of the respective claims. Lindl. Mines, § 783. As against a collateral attack, the action of the land department in issuing such patents conclusively settled that all steps necessary to constitute a valid location of these mining claims had been taken, which included the discovery of mineral. This question has been so frequently decided that we do not deem it necessary to discuss it. Id. § 777; *Davis* v. *Weibbold,* 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; *Poire* v. *Wells,* 6 Colo. 406; *Justice M. Co.* v. *Lee,* 21 Colo. 260, 40 Pac. 444; *St. Louis Sm. Co.* v. *Kemp,* 104 U. S. 636, 26 L. Ed. 875; *Steel* v. *Refining Co.,* 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226. It is contended on be-

half of appellant that this principle is not applicable as between tunnel site and lode locations, because its rights were not involved in the patent proceedings. As to inchoate rights which attach to a tunnel location, this may be true, but it had none, unless it successfully attacked the title of appellee in apt time, for the location of appellee's claims was prior to the location of the tunnel site. At the time of that location, receiver's receipts had issued upon the Mammoth Pearl and Monarch. We cannot understand how, upon any possible theory, the rule announced is not applicable as between a tunnel-site location over a prior lode location upon which a patent has already issued. So long as the title to the claims of appellee was only evidenced by receiver's receipt, it was still subject to an attack in a way; but, when patent finally issued upon these claims, it conclusively settled, as against the junior location of appellant's tunnel site, that all steps necessary to constitute a valid location of appellee's claims had been taken.

Errors are assigned upon the action of the court below in denying appellant's petition to remove the cause to the circuit court of the United States for the district of Colorado. No argument is made on this assignment, and we therefore decline to consider or pass upon it.

A further error assigned and argued by appellant is that the court erred in overruling its motion for leave to develop the blind veins in its tunnel within the lines of appellee's claims for the purpose of establishing their character. Its acts in attempting to initiate title to these veins was a trespass, which it was not entitled to continue under any leave of court.

This disposes of all the questions argued, and, finding no error in the record, the judgment of the district court is affirmed.

Affirmed.

J. M. CHILDERS ET AL. v. S. H. NEELY.

(47 West Virginia 70; 34 S. E. 828. Supreme Court of Appeals. November 28, 1899.)

[1]**Working co-tenants are partners.** Where tenants in common or joint tenants of an oil lease or mine unite and co-operate in working it, they constitute a mining partnership.

[2]**Majority controls.** When members of a mining partnership cannot agree in management, those having a majority interest control its management in all things necessary and proper for its operation.

Sale no dissolution. A sale of his interest by a member of a mining partnership to another member or a stranger does not dissolve the partnership, as in ordinary partnerships.

Negligence—responsibility to co-partner. If loss comes to the firm by the culpable negligence or breach of duty or wrongful conduct, or diversion of the social property from the firm's business to other business by one member, he is personally accountable therefor in an accounting between the members.

Partners have a lien on the social property for advances or balance due them, after debts; but if they have divided the property or product of the business, giving each his share in severalty, and separating it from the balance, no such lien exists on the property or product so actually divided. Such is the case with "division orders" in oil mining.

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[1]*Hartney* v. *Gosling*, 10 Wyo. 346; 22 M. R. —.

A mining partnership exists where the several owners of a mine co-operate in the working of the mine. *Higgins* v. *Armstrong*, 9 Colo. 38. *Hodgson* v. *Fowler*, 24 Colo. 282. Such partnership is governed by many of the rules relating to ordinary partnerships, but differing therefrom in many important particulars. *Higgins* v. *Armstrong*, 9 Colo. 38; 10 Pac. 232.

Where a party has advanced money to a lessee of a mine and later accepted an interest in the lease as security and did work on the mine to prevent forfeiture: *Held*, not sufficient to constitute such assignee a partner. *Butler* v. *Hinckley*, 17 Colo. 526; 30 Pac. 250.

[2]*Dougherty* v. *Creary*, 1 M. R. 36.

Majority hold the control. *Hawkins* v. *Spokane Co.* 3 Ida. 650; 33 Pac. 40. *Patrick* v. *Weston*, 22 Colo. 52; 43 Pac. 446.

Majority control. Tunnels and buildings are not permanent improvements and are within this rule as to majority. *Markle* v. *Wilbur*, 200 Pa. 457; 21 M. R. —.

Full accounting with dissolution. If a bill is filed by a member of a co-partnership for dissolution and account, and cause is shown for dissolution, there should be a decree of dissolution and full account, not one allowing the partnership to continue its business, and making only a partial account, and decreeing on its basis in favor of one against another member for a balance on such partial account, leaving assets untouched by the account.

Receiver. When cause is shown for dissolution of a partnership, and the members are discordant and at ill will. and the partnership hopeless of prosperity, it should be dissolved, and a receiver and manager appointed, instead of leaving its assets and business wholly in the possession and control of one member, excluding the other.

[3]**Equity, as a general rule, does not entertain a bill of account between** partners unless a disolution and winding up are asked, and cause therefor shown. Then there should be dissolution and full final account.

(Syllabus by the Court.)

Appeal from Circuit Court, Tyler County; R. H. FREER, Judge.

Bill by J. M. Childers and another against S. H. Neely. Judgment for plaintiffs, and defendant appeals. Reversed.

F. L. BLACKMAR, for appellant.

ROBERT MCELDOWNEY and G. M. MCCOY, for appellees.

Each member liable for services contracted for by majority and actually rendered although employment against protest of minority. *Patrick* v. *Weston*, 22 Colo. 45; 43 Pac. 446.

[3]**A partner cannot sue a co-partner except by bill in account rendered—he cannot sue independently for his breach of contract to purchase mines for partnership assets.** *Crow* v. *Green*, 111 Pa. 637; 5 Atl. 23.

Partner may sue partner for money borrowed, although put into the firm, without previous settlement. *Bull* v. *Coe*, 77 Cal. 54; 18 Pac. 808; 11 Am. St. R. 235.

Express promise to pay agreed balance renders promissor liable at law without dissolution. *Haskins* v. *Curran*, 4 Ida. 573; 43 Pac. 559.

BRANNON, J. Childers and Ramey filed a bill in equity in the circuit court of Tyler against Neely, praying that a partnership between them be dissolved, an account taken "of all its accounts, dealings, and transactions whatever," and that a manager be appointed to take charge of the property. The business was oil production. Neely admitted the joint enterprise, but denied the partnership; and he joined in request for account, and did not resist a dissolution, if a partnership. The decrees made a partial account, decreed its balance against Neely, and denied him further participation in the partnership, and he appealed.

This case raises an interesting and important subject in this mining state; that is, whether, and when, joint tenants or tenants in common, jointly operating for oil, are partners, or merely co-owners. The bill asserts a partnership, while Neely denies it; asserting that it is a case, not of partnership, but of co-ownership.

In two leases of town lots for oil and gas purposes, Childers owned one-fourth interest; Ramey, a three-eighths interest; Neely, a three-eighths interest. They were so far joint tenants. They agreed to develop the lots for oil, but made no written articles of partnership,—in fact, no oral express formation of a partnership. They simply, by an indefinite understanding, agreed to develop their common property, each giving his skill, paying his share of outlay proportionate to his ownership, and getting his share of the product proportioned to such ownership. I use the word "product," instead of "profits," because there was no contract explicit on this point to distinguish product from profit. "Partnership must be distinguished from joint management of property owned in common. Where two partners own a chattel, and make a profit by the use of it, they are not partners, without some special agreement which makes them so." T. Pars. Partn. § 76. Two heirs or other co-owners of a farm, jointly farming it for profit, are not partners. There is a peculiar

partnership, called a "mining partnership," partaking partly of the nature of an ordinary trading or general partnership, on the one hand, and partly of a tenancy in common, on the other. It is an important question to those engaged in the oil and other mining business whether each one is jointly and severally liable for all the doings of every or any other of the associates in the venture, as in ordinary trading partnerships. What is a mining partnership? 15 Am. & Eng. Enc. Law, p. 609, says: "When tenants in common of a mine unite and co-operate in working it, they constitute a mining partnership." Many authorities there cited thus define it. See the California case of *Skillman* v. *Lachman,* 83 Am. Dec. 96, and note discussing it fully; *Lamar* v. *Hale,* 79 Va. 147. Mere co-working makes them partners, without special contract. Barring. & A. Mines & M. Courts of equity take jurisdiction of them as if general partnerships. 2 Colly. Partn. c. 35. Of course, owners of mines, oil leases, or farms can by agreement make an ordinary partnership therein; but "where tenants in common of mines or oil leases or lands actually engage in working the same, and share, according to the interest of each, the profits and loss, the partnership relation subsists between them, though there is no express agreement between them to be partners or to share profits and loss." *Duryea* v. *Burt,* 28 Cal. 569. The presumption in such case would be that of a mining partnership, rather than an ordinary one, in absence of an express agreement forming an ordinary general partnership. Perhaps the case of *Bank* v. *Osborne,* 159 Pa. St. 10, 28 Atl. 163, and other cases in that state cited in Bryan, Petroleum & Natural Gas, 238, would justify the inference that the parties operated as tenants in common; but the current of authority elsewhere recognizes the inference of mining partnerships. That states does not recognize such a partnership. Justice Field said in *Kahn* v. *Smelting Co.,* 102 U. S. 645, 26 L. Ed. 266: "Mining partnerships, as distinct associa-

tions, with different rights and liabilities attaching to their members from those attaching to members of ordinary partnerships, exist in all mining communities. Indeed, without them successful mining would be attended with difficulties and embarrassments much greater than at present." One leading distinction between the mining partnership and the general one is that the general one has a material element of its membership, *a delectus personæ* (choice of person), while the other has not. Those forming an ordinary partnership select the persons to form it, always from fitness, worthiness of personal confidence; but we know such is not always or often the case in oil ventures. It is because of this *delectus personæ* that the law gives such wide authority of one member to bind another by contracts, by notes, and otherwise. One is the chosen agent of the other. Hence, when one member dies or is bankrupt, or sells his interest to a stranger, even to an associate, the partnership is closed, one chosen member is gone, the union broken, because he may have been the chief dependence for success, and the newcomer may be an unacceptable person, who would entail failure upon the firm. In the mining partnership those occurrences make no dissolution, but the others go on; and, in case a stranger has bought the interest of a member, the stranger takes the place of him who sold his interest, and cannot be excluded. If death, insolvency, or sale were to close up vast mining enterprises, in which many persons and large interests participate, it would entail disastrous consequences. From the absence of this *delectus personæ* in mining companies flows another result, distinguishing them from the common partnership, and that is a more limited authority in the individual member to bind the others to pecuniary liability. He cannot borrow money or execute notes or accept bills of exchange binding the partnership or its members, unless it is shown that he had authority; nor can a general superintendent or manager. They can

only bind the partnership for such things as are necessary in the transaction of the particular business, and are usual in such business. *Charles* v. *Eshleman,* 5 Colo. 107; *Skillman* v. *Lackman,* 83 Am. Dec. 96, and note; *McConnell* v. *Denver,* 35 Cal. 365; *Jones* v. *Clark,* 42 Cal. 181; *Manville* v. *Parks,* 7 Colo. 128, 2 Pac. 212; *Congdon* v. *Olds,* 18 Mont. 487, 46 Pac. 261; *Judge* v. *Braswell,* 13 Bush, 67; *Waldron* v. *Hughes,* 44 W. Va. 126, 29 S. E. 505. In fact, it is a rule that a non-trading partnership, as distinguished from a trading commercial firm, does not confer the same authority by implication on its members to bind the firm; as, e. g., a partnership to run a theater or other single enterprise only. *Pease* v. *Cole,* 53 Conn. 53, 22 Atl. 681; *Deardorf* v. *Thacher,* 78 Mo. 128; Smith, Merc. Law, 82; T. Pars. Partn. § 85; *Pooley* v. *Whitmore,* 27 Am. Rep. 733. A mining partnership is a non-trading partnership, and its members are limited to expenditures necessary and usual in the particular business. Bates, Partn. § 329. Members of a mining partnership, holding the major portion of property, have power to do what may be necessary and proper for carrying on the business, and control the work, in case all cannot agree, provided the exercise of such power is necessary and proper for carrying on the enterprise for the benefit of all concerned. *Dougherty* v. *Creary,* 89 Am. Dec. 116.

These prinicples settle much of this case. The demurrer was properly overruled, because there was a partnership, and equity only has jurisdiction to settle partnership accounts. 5 Am. & Eng. Dec. Eq. 74; 17 Am. & Eng. Enc. Law, 1273.

Neely excepted to the commissioner's report of settlement because of the allowance to Ramey of an expenditure advanced by Ramey of $369.75, as excessive, and because for repairs on two boilers without his consent. If the parties were mere joint tenants, consent would be necessary. *Ward* v. *Ward's Heirs,* 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449.

But, being partners, as above stated, a partner has power to order necessary repairs. Besides, Ramey owned a majority interest. The boilers were burnt badly, and it seems that this outlay, though large, is proven, and was necessary and usual in such a business, and, if unattended with other circumstances, would be clearly allowable under principles above stated. The commissioner reports that the injury to the boilers came from neglect of the pumpers; but much evidence tends to show that Ramey, without consent of Neely, removed the boilers off the ground owned by the firm, upon a lease of Ramey and Childers, in which Neely had no interest, and used them with another boiler in boring and operating wells thereon in connection with these wells of the firm, in Neely's absence, and put too much work upon them, with inadequate supply of water, which, likely, by heavy firing, caused the burning of the boilers. If this is so, how can Ramey expect pay for this outlay? Would so serious an injury have occurred to the boilers had this improper use of them not been made? We cannot say so with certainty, but it seems not likely. Ramey has no just claim to be repaid expenditure for repairs caused by himself,—the diversion of the firm property to his own work, from the work of the firm. Losses from neglect of duty or bad faith of a partner, or breach of duty, or breach of a partnership agreement, or improper diversion of its property to purposes foreign to its business, will be charged to him, in accounting. 17 Am. & Eng. Enc. Law, 1217; 1 Colly. Partn. § 312; Story, Partn. § 169; T. Pars. Partn. § 151. Ramey does not deny such use.

The exception for the $239.75 allowed Ramey for three-eighths of expense seems not well taken, and was properly overruled. The commissioner reports that Neely should be allowed nothing for such use of the boilers for business of Childers and Ramey outside the legitimate firm business, yet allows him $100 therefor. We are unable to say that

such sum is not correct in amount, and will have to sustain the commissioner as to it.

Neely excepted because the commissioner reported that he was not entitled to any allowance on the claim made by Neely, that by reason of the use of the firm's boilers in boring and operating wells of Childers and Ramey on adjoining leases owned by them, in which Neely was not interested, the two wells of the firm, which had been bored before the others were, and were paying wells, were often shut down and unproductive, while those other wells were going on, and that by reason of want of water and steam, and the inadequacy of the engines to run all the wells, five or six in number, the production of the firm's wells was diminished. The commissioner says that Neely suffered no appreciable injury thereby. If injured at all, it was appreciable, and to be estimated. Ramey states, in short, that Neely was not entitled to a cent on this score. Neely's evidence is distinct that he was there numerous times, and found these two wells still. He swears to a large loss from this cause. He furnishes considerable evidence to sustain him in some loss from this score, and it seems that equity should make some compensation for it. There is evidence that Ramey, when asked why the wells were shut down, said that he had a larger interest in the other wells. Ramey (having bought out Childers' interest, and Neely being absent almost all the time of operation) had sole charge. The commissioner bases his opinion of no injury to Neely from pipe-line reports, which are not before us; but it does seem from the evidence that the firm business was neglected, and loss to it accrued therefrom to an appreciable extent, for which some compensation should be made. It is difficult to say what should be allowed on this account, it being a thing of only approximate estimate; and still it seems an allowance should be made, as Ramey is claiming for outlay, and himself controlled the business.

When this suit was brought, Childers and Ramey obtained in it an injunction enjoining the pipe-line companies transporting the firm's oil from paying Neely for his share of the oil to which he was entitled under his division orders, and enjoining Neely from any further participation in the partnership, and from selling his share of the oil; thus taking from him the wells and their proceeds, and leaving Ramey in sole charge of them. Neely complains that the court refused to dissolve this injunction. His counsel says there was no right to it, as the bill charged no insolvency. The bill, however, did charge that Neely had failed to contribute his part of the expense of the business, and that Ramey and Childers had made large outlays therefor, and that Neely had refused to make settlement, and was largely indebted to his associates from the transactions of the partnership. This justifies the injunction, if the oil of Neely were social assets, as partners, in advancing for expenditures for the partnership, have a lien on partnership property for advances. *Skillman* v. *Lachman,* 83 Am. Dec. 109; *Duryea* v. *Burt,* 28 Cal. 570; T. Pars. Partn. § 402, note. But this lien is only on partnership property, while distinctly such; for it is the law that if there is a separation or division of the property, or part of it, there is no lien. If two partners consign goods for sale, and direct the consignee to carry the proceeds to the account of each, and it is done, neither partner has any lien on the share of the other in those proceeds, though it would have been otherwise if they had remained part of the common property. 2 Lindl. Partn. § 683; 1 Colly. Partn. § 108, note. Now, these partners agreed to have division orders when they began business (that is, the pipe lines to give each a certificate of his share of the oil committed to them, which was a product of the wells); and this effected a separation of that product, making each one's share his several property, and severing it

from the social property, if it was such at any moment. There being no lien, there was no justification for the injunction. It perhaps disabled Neely from paying as the bill demanded of him.

There is another error in the proceeding. The bill demanded a dissolution. It showed abundant cause, and the evidence shows abundant cause, of dissolution. The bill charges that the plaintiffs and Neely made a settlement to a certain date, but that they had been unable to get Neely to make a settlement since then; that he was violent and abusive, had threatened them with violence, and declared he would have nothing more to do with them; that he would not contribute to expenses; that bills remained unpaid; and that because of the unsatisfactory condition of the business, and the "disagreements, dissensions, and disaffections between the partners, the property and business were suffering." The evidence shows these disagreements and dissensions. Thus, it was plain that the business was hopeless of success and prosperity, and the interests of all parties demanded absolute dissolution at the hands of the law. Reconciliation, harmony, and success were utterly beyond hope. 17 Am. & Eng. Enc. Law, 1104. Therefore the court should have decreed dissolution absolute, and directed an account of the partnership, and wound it up. But it decreed no dissolution, but, on the contrary, suffered the partnership still to subsist, and, indeed, go on in the sole hands, and management of Ramey, excluding Neely therefrom, and decreed that the settlement by the commissioner should only apply to its date, leaving it open to future account. The decree perpetuated the injunction, forever prohibiting Neely from participation in the business, and provided that when he should pay $487.15 found due from him, and costs, the injunction should cease. That excellent, very late work, containing the leading late decisions in equity in America and England, the

American and English Decisions in Equity, with elaborate notes collecting decisions (volume 5, p. 52), lays down the rule that equity can only entertain jurisdiction for an account when it can make a final decree in the suit; citing *Randolph's Adm'x* v. *Kinney,* 3 Rand. 394. That work (page 109) says, "As a general rule, a bill for accounting between partners which does not also seek a dissolution of the partnership will not be maintained;" citing cases,—among them, *Coville* v. *Gilman,* 13 W. Va. 314, in which Judge Green fully sustains this position. T. Pars. Partn. § 206; 2 Lindl. Partn. 948. If ever there were cases which, by bill and proof, called for dissolution and final account, not partial, this is one. And, besides the showing of the bill and proof, a petition for rehearing alleged that Ramey had sold the boilers. The evidence so shows. This would charge Ramey to credit of Neely. There was partnership property in Ramey's hands. There could only one adequate relief be given,—dissolution, sale of the property entire, and full account. But no provision was made for dissolution, sale, or full account,—only a partial settlement and decree against Neely for the sum found by it. The bill alleged that the property could not be divided in kind. If the injunction applied to property belonging to the firm, on which a lien rested for the other partners, it would be proper to continue it until final account and decree. *Robrecht* v. *Robrecht,* 46 W. Va. 738; 34 S. E. 801. But Neely's share of the oil was his separate property. And I do not see why he should, without cause, be excluded from participation, letting Ramsey have sole control. A receiver, impartial between them, was proper, under the circumstances. "If no dissolution is sought, a receiver and manager will not be appointed; but, with a view to a dissolution or winding up, a receiver and manager will be appointed, if there are any such grounds for appointment as are proper in other cases, or if the partners cannot agree to working

the mines until sold. Colly. Partn. § 381. Therefore we dissolve the injunction, reverse the decree, overrule the demurrer to the bill, and remand for further proceedings as herein indicated, and further according to principles governing courts of equity in such cases.

Reversed.

ECLIPSE OIL CO. v. SOUTH PENN OIL CO.

(47 West Virginia 84; 34 S. E. 923. Supreme Court of Appeals. Nov. 28, 1899.)

If one party may terminate an estate at will, so may the other. The right to terminate is mutual. *Cowan* v. *Iron Co.* 3 S. E. 120; 83 Va. 347.

Right to surrender. An executory gas and oil lease, which provides for its surrender at any time, without payment of rent or fulfillment of any of its covenants on the part of the lessee, creates a mere right of entry at will, which may be terminated by the lessor at any time before it is executed by the lessee.

The execution of a new lease to other lessees and possession thereunder, render such prior executory lease invalid.

An executory lease that is unfair, unjust, or unreasonable will not be enforced in equity.

[1]**Unilateral contract.** If one party to a contract is not bound to do the act which forms the consideration for the promise, undertaking, or agreement of the other, the contract is void for want of mutuality. Brannon, J., dissenting.

Appeal from Circuit Court, Wetzel County; G. W. Farr, Judge.

[1]A naked option is void as unilateral and without consideration. *Finerty* v. *Fritz*, 1 M. R. 438. *Smith* v. *Reynolds*, 2 M. R. 227.

The same as to a unilateral oil lease. *Trees* v. *Eclipse Co.*, 20 M. R. 260.

One dollar is a sufficient consideration for a limited option. Discussion of the subject of nominal consideration. *Lowther Co.* v. *Guffey*, 52 W. Va. 88; 22 M. R. —. *Mathews Co.* v. *New Empire Co.* 122 Fed. 972.

Where the lease shows on its face that the real consideration is the prospecting for oil and no work is done for a year the lease becomes void. *Hodges* v. *Brice*, — Tex. —; 74 S. W. 590.

An accepted option becomes a contract of purchase and sale and time ceases to be the essence of the contract. *Pennsylvania M. Co.* v. *Smith*, 207 Pa. 210; 56 Atl. 426.

Gas lease with prescribed term and providing for small annual payment thereafter: *Held*, that lessee could not delay to sink indefinitely by paying the nominal rent. *Indiana Co.* v. *Granger*, — Ind. App. —; 70 N. E. 395.

Action by the Eclipse Oil Company against the South Penn Oil Company. Decree for defendant. Plaintiff appeals. Affirmed.

HUBBARD & HUBBARD, J. R. SUMMERVILLE, and ROBERT MCELDOWNEY, for appellant.

U. N. ARNETT, A. B. FLEMING, and M. F. ELLIOTT, for appellee.

DENT, P. This is a controversy between the Eclipse Oil Company, appellant, and the South Penn Oil Company and others, from the circuit court of Wetzel county, over a lease in the following words, to wit:

"Agreement made and entered into this 11th day of May, A. D. 1897, by and between Henry Garner, of the county of Wetzel and state of West Virginia, of the first part, and H. J. and J. C. Stolze, parties of the second part, witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, does covenant and agree to lease, and by these presents has leased and granted, the exclusive right unto the parties of the second part, their heirs or assigns, for the purpose of operating and drilling for petroleum and gas, to lay pipe lines, erect necessary buildings, re-lease, and subdivide all of that certain tract of land situate in Procter district, Wetzel county, and state of West Virginia, and bounded and described as follows, to wit: Bounded on the north by lands of C. Parsons' heirs, on the east by the lands of Burton, on the south by the lands of Isaac and William Smith, on the west by lands of James Newman; containing 102 acres, be the same more or less. The parties of the second part, their heirs or assigns, to have and to hold the said premises for and during the term of three years from the date thereof, and so long thereafter as oil or gas can be produced in paying quantities. The parties of the second part, heirs or assigns, agree to give to the first party one-eighth part of all petroleum obtained from the said premises, as produced in a crude state; the said one-eighth part of the petroleum to be set apart, in the pipe line running said petroleum, to the credit and for the benefit of the said party of the first part. The said party of the first part is to fully use and enjoy the said premises for the purpose of tillage, except such part as

shall be necessary for said mining purposes, and a right of way over and across the said premises to the place or places of mining or operating. The said parties of the second part are further to have the privilege of using sufficient gas and water from the premises herein leased to run the necessary engines, with the right to secure any machinery, fixtures, and buildings placed on said premises by the said parties of the second part or those acting under them, and are not to put down any well for oil on the lands hereby leased, within fifty rods of the buildings now on said premises, without the consent of the said party of the first part. Damages done to growing crops shall be paid by second party. It is agreed that, if gas is found in paying quantities, the consideration in full to the party of the first part for gas shall be $200.00 (two hundred dollars) per annum for the gas from each well, when utilized off the premises; gas free of charge for household uses to first party. The parties of the second part agree to drill one test well on the above described premises within six months from the execution of this lease, or, in lieu thereof, thereafter pay to the said party of the first part one dollar per acre per annum until such well is completed; and if said test well is not completed within six months from the above date, or rentals paid thereon, this lease is null and void, and not further binding on either party. And it is further agreed that the second parties, their heirs or assigns, shall have the right at any time to surrender up this lease, and be released from all money due and conditions unfulfilled; then and from that time this lease and agreement shall be null and void, and no longer binding on either party, and the payments which have been made held by the party of the first part as the full stipulated damages for nonfulfillment of the foregoing contract; that all conditions between the parties hereto shall extend to their heirs, executors and assigns. In witness whereof, we, the said parties of the first and second parts, have hereunto set our hands and seals. Henry Garner. [Seal.] H. & J. C. Stolze. [Seal.] Witness: Sam J. Beck."

This lease was assigned to the Eclipse Oil Company. On the 18th day of June, 1898, the lessor again leased this property to J. A. Phillips, who assigned to the South Penn Oil Company. The latter company began developments, when the Eclipse Oil Company obtained an injunction, claiming that its lease was still valid, although nothing was done thereunder except the payment by it of the annual rental provided for on the 10th day of November, 1898, and alleged

acceptance thereof by the lessor. The injunction was dissolved on motion, and plaintiff appeals.

The effect of the last clause of the controverted lease appears to have been overlooked by counsel. It is in these words: "And it is further agreed that the second parties, their heirs or assigns, shall have the right at any time to surrender up this lease, and be released from all moneys due and consideration unfulfilled; then and from that time this lease and agreement shall be null and void, and no longer binding on either party." etc. This clause apparently destroys this lease, or renders it invalid, at least until some consideration has passed from the lessee to the lessor. Lessee's counsel claim that he was not bound to do anything or pay anything until 18 months from the date of the lease, and in the meantime he has the right to surrender it, and thereby be released entirely from any obligation whatever. This renders it, to this extent, *nudum pactum,* by which the lessor is not bound any more than the lessee; and until something is done in consummation thereof, either party may terminate it. "If one party may terminate an estate at his will, so may the other. Right to terminate is mutual." *Cowan* v. *Iron Co.,* 83 Va. 547, 3 S. E. 120; *Petroleum Co.* v. *Coal, Coke & Mfg. Co.,* 89 Tenn. 381, 18 S. W. 65; *Knight* v. *Iron Co.,* 47 Ind. 105; *Pidgeon* v. *Richards,* 4 Ind. 374; 2 Bl. Comm. 135. The lessee was out nothing, at no expense, and running no risk, and yet he makes the conditions of his contract such that the lessor cannot tell for 18 months whether the contract is to be binding on the lessee or not. In the meantime, he receives nothing for his delay. As Judge Brannon says in the case of *Roberts* v. *Bettman* (W. Va.) 30 S. E. 95, "The covenant to pay is brought to birth by the lease, only to die at the hands of its mother," —a case of fetal strangulation which kills the mother. The lessor had the right to terminate this *nudum pactum* at any time, which he effectually did by making a new lease, and

giving possession of the premises to another. 12 Am. & Eng. Enc. Law, 757; *Kelly v. Waite,* 12 Metc. (Mass.) 300; 2 Bl. Comm. 146; *Guffy* v. *Hukill,* 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759. Nor can declarations or conduct on his part affect the rights of his new lessee. The lessor's conduct in receiving the rent and recognizing the prior leases after he had parted with the estate would be of very little weight, if admissible as evidence, for he "was an old, feeble man, easily influenced." It must be presumed that the lessor, in executing the last lease, intended to do and did what he had the legal right to do. The lessees, having the mere right of entry, were not bound to do so, and could escape the payment of any consideration at any time, at their will, by surrender of the lease. They could hold on for years, or until their lessor pressed for his rent, and then surrender his own lease in satisfaction thereof. This is not like the lease in the case of *Roberts* v. *Bettman,* cited above, and in which the majority of this court held that the lessor was entitled to demand rent until the lease was surrendered. That lease provided that at any time the lessee might surrender the lease, and "thereafter be discharged," while this lease provdes that the lessee "shall have the right at any time to surrender up this lease, and be released from all moneys due and conditions unfulfilled." It is a complete release, as referred to in Judge English's dissenting opinion in the case last cited. Nor was the right of the lessor to terminate the lease raised in that case. But both parties having allowed the lease to remain in being for a certain length of time, without any effort on the part of either party to terminate it, the court held that the lessee, having retained the lease and enjoyed its benefits, could not take advantage of his own wrong to escape the payment of the accrued rents. It was admitted that he could surrender at any time, and thereafter be discharged, while under the present lease the lessees could surrender, and were released. There was nothing to bind them to pay rent or

explore. These matters were as completely at their will as though they had signed no lease. The lessor, by execution of the junior lease, passed all his right to his lessee; and, if there was anything necessary to be done to terminate the senior lease, the lessee had the right to do it. It might be possible to show in some way that the junior lease was not intended to take away the right of entry of the senior lessees. There would have to be proper allegations to this end in the bill. It contains none, and the presumption is that there are none. The plaintiff rests its case entirely on the validity of its leases. The defendant's lease renders them invalid. The plaintiff was at no expense or loss before it had full notice of the termination of its leases. Such termination was neither inequitable nor unconscionable, but rid the lessor of a dubious, speculative contract, liable to be defeated at any moment, to his loss and injury, by his lessees. The plaintiff afterwards paid the rent at its own risk, and, with wide-open eyes, assumed the consequences thereof. This determination renders it unnecessary to construe the thereafter clause so eloquently and earnestly dwelt upon by the learned counsel on both sides of this litigation, and the questions raised will be left open for future consideration in a proper case.

There is another ground for which this lease should not be enforced by a court of equity, and that is its unfairness. The lessor executed this lease with the expectation of a prompt development of his land. The lessees deceived him by the covenant to sink a well in six months, and then, under the pretense of fixing a penalty, in the shape of rental, for failure to complete the well in the time prescribed, skillfully turned it into a speculative lease for rental merely, which, according to their claim, they had 18 months, and so much longer as they could postpone the same, to decide to pay or not. This evidences a plain intention on their part not to explore for oil or gas, and the covenants in relation thereto

were simply a blind to deceive the confiding lessor. It is decidedly a one-sided lease, and, if the lessor had remained quiet, they could have held it for an indefinite period without either exploring for gas or oil or paying any rent. That only those contracts which are fair, just, and reasonable will be specifically enforced is an unquestionable doctrine of equity, and any trace of unfairness will render specific performance impossible. 22 Am. & Eng. Enc. Law, 1022; *Vogel* v. *Pekoc,* 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; *Weaver* v. *Weaver,* 109 Ill. 225; Chit. Cont. 155; Bish. Cont. 32; 1 Whart. Cont. 5; *Marble Co.* v. *Ripley,* 10 Wall. 339, 19 L. Ed. 955; *Alworth* v. *Seymour,* 42 Minn. 526, 44 N. W. 1030.

The decree complained of is affirmed.

On Petition for Rehearing.

(Feb. 5, 1900.)

In their petition and argument for rehearing, plaintiff's counsel earnestly urge at least six several reasons why a rehearing should be granted in this case, with such force and sincerity as compel a careful consideration of them necessary; and, if any of them are well founded in law, a rehearing should follow as a matter of course. If they are all plainly untenable, then the rights of the appellee to have a speedy end of this litigation should prevail over any disposition the court or its members may entertain of according to the attorneys the privilege of reargument for their own or their client's satisfaction.

The first position is that the court decided the case on a point not fairly arising on the record, in total disregard of points raised in argument by counsel on either side, and fairly arising upon the record. This presents at once the question, what is the point fairly arising upon the record

which was decided by the circuit court, and then brought to this court to be reviewed by it? It was the dissolution of the plaintiff's injunction. And this is the sole point fairly arising on the record presented for the consideration of this court, and the question is, did the circuit court err in dissolving the injuction? The circuit court's conclusion may be right, and its reasons therefor wholly wrong; yet this court will never reverse a right decision because the reasons advanced in support thereof may be baseless. It is the duty of this court to affirm the decree, if the record justifies it, notwithstanding that the circuit court and the counsel may be laboring under an entire misapprehension as to the true merits of the controversy or the questions involved. Nor do the reasons by which the circuit court was actuated anywhere appear in this record. Counsel have seen fit to have an entertaining contest over what they consider to be the reason by which the circuit court was controlled in reaching its conclusion. This, however, is not a moot court, and cannot be governed by the consent or argument of counsel, but it must administer justice as the very right is made to appear from self-inspection of the record. This is the law, and there is no decision of any court to the contrary. It is in perfect accord with the provision of the constitution, to wit, article 8, § 5; "When a judgment or decree is reversed or affirmed by the supreme court of appeals every point fairly arising upon the record of the case shall be considered and decided; and the reasons therefor shall be concisely stated in writing and preserved with the record of the case." It is not the opinion of the counsel as to what they consider, agree, or argue may be the points in issue, either in their petitions or briefs, but what the record itself discloses, that the court must decide. The circuit court, in determining the single point presented to this court, to wit, the dissolution of the injunction, necessarily held that the plaintiff was not entitled to the relief sought, but that its equity, for some reason, in

some respect was defective. The circuit court is not required to give its reasons, and if it did, and they were insufficient, this court would not in any sense be governed by them; but it must examine the record, and ascertain whether the decision is sustained thereby. Counsel who are presumed to be fully advised of the law have the right to set up and knock down as many straw propositions as they please, but they cannot compel the court to follow their example, or require it to be bound by their conclusions. Neither can they compel the court to enter into the discussion of propositions of law not necessary for the decision of the points of error presented to the court for its determination. This court must presume that the circuit court was controlled by the true legal reasons justified by the record for its conclusion, rather than insufficient ones presented by the counsel in argument. Counsel undoubtedly confound the points fairly arising on the record with the legal reasons to be given in support of the decisions of such points. The authorities referred to and relied on clearly show this to be the case. For instance, the case of *Kesler* v. *Lapman,* 46 W. Va. 293; 33 S. E. 289. In this case, and numerous others, this court has held that points not determined by the circuit court will not be considered by this court on appeal. *Robrecht* v. *Robrecht,* 46 W. Va. 738, 34 S. E. 801; *Woods* v. *Campbell,* 45 W. Va. 203, 32 S. E. 208; *Bank* v. *Gould,* 42 W. Va. 137, 24 S. E. 547; *Alderson* v. *Commissioners,* 32 W. Va. 461, 9 S. E. 863; *Harris* v. *Hauser,* 26 W. Va. 602; *Armstrong* v. *Grafton,* 23 W. Va. 50; *Burke* v. *Adair,* Id. 165. But this court has not held, nor could it possibly do so, that a wrong legal reason given for a right decision of a point presented would render such decision erroneous, and that it would be reversed and sent back, that the court might correct its reasons to correspond with its conclusion. A point of law, while it may affect, is not equivalent to, the point of error at issue in a controversy; for it may give rise to and

be governed by numerous points of law, and, while the court may be in error as to the one, it may be right as to the other. This court is in duty bound to consider any questions of law relating to the point in issue, whether mentioned or overlooked by counsel, without notice to them; and in rule 5, § 4, of the long-established rules of this court (23 W. Va. 823), the court gives notice that it will notice any point of error, whether assigned or not. This is its legal duty, without regard to any rule on the subject. The court sits to administer justice, and not to teach or be taught law. When the question is a plain, legal one, it is not incumbent on the court to call counsel's attention to it, or request argument concerning it. For the very reason that argument is not necessary in its determination. The court must be presumed to know some of the elementary principles of law, and capable of passing thereon without the assistance of counsel.

By its suit the plaintiff put the validity of its own lease in issue. In dissolving the injunction, the circuit court necessarily held the lease, for some reason, inoperative. The counsel, in argument, give a reason for the action of the circuit court. It may be the true one, but this court cannot be governed by it. On inspection of the lease for construction, it finds it plainly invalid for other reasons than those asserted; thus sustaining the conclusion of the circuit court. This it was its duty to do, it matters not how unfavorably such action may impress the defeated litigant and counsel. That the decision is just and in accordance with law, conscience, and duty, should be a sufficient shield to ward off the pointed arrows of criticising sarcasm, though poisoned with the malevolence of defeat. The clause of the lease on which counsel think this controversy hinges is a very doubtful one, susceptible of as many constructions as minds; and while, in accordance with *Bettman* v. *Harness,* 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566,—being merely speculative in its nature,—it should be most strongly construed

against the lessee, yet any construction thereof must be subject to the most serious doubts, with the probable result of great legal injustice. Such being the case, it is far better to uphold the conclusion of the circuit court by legal propositions and application thereof to this lease, about which there can be no doubt except in minds warped and biased by some personal interest.

The second reason urged by the plaintiff is "that the conclusion reached by the court upon the question it originated is not warranted by the law." The plaintiff, in instituting its suit to have its lease declared valid, and not the court, originated the question involved. When it came into equity, it should have presented a lease not already avoided, and not sought the enforcement of a contract thus rendered unconscionable. Points of distinction are attempted to be shown between this case and the case of *Cowan* v. *Iron Co.*, cited. That was a case to cancel a lease which the lessee claimed to be an absolute deed. The court held that because it contained a stipulation that the lessee should "have the right and privilege of removing from the said tract of land at any time any machinery, buildings, and fixtures or improvements made or erected upon it by the lessee," such stipulation authorized the lessee to terminate the lease at any time, and, the lessee having such right, the lessor could do likewise, as the right to terminate must be mutual. In the present lease the right to terminate is not left to mere inference, but it is expressly reserved to the lessee; and, after the lease had been formally terminated by the lessor executing a new lease, the lessee brings suit to enforce it. In that case the lease was for the purpose of producing metal ores; in this, it is for the production of oil. In that case the lessee was not to pay anything unless he should produce ore. In this case the lessee was not bound to pay anything unless he chose to do so. In that case the term was indefinite. In this, the term of three years is specified. In that case the

lessee entered into possession, mined some ore, and made payments therefor, and then ceased operations for the reason that they were not remunerative. In this case the plaintiff neither entered into possession, nor paid any rentals or other consideration, until after the lessor terminated the lease by the execution of a new lease to others. In that case the lessee could have held forever, if the lease was held valid, without doing anything or paying rent. In this case the lessee could have held for 18 months, if its claim was held valid, without doing anything or paying anything. The points of similarity as to the essentials are much greater than the points of dissimilarity nonessential in their character, so far as the law governing them is concerned. "It is a well-settled and well-known rule of law that a lease or estate which is at the will of one of the parties is equally at the will of the other party. One of them is no more and no further bound than the other. As the lessee in this case had the clear right, at his will, to terminate the tenancy at any time, so had the lessor. It cannot be otherwise." *Knight v. Iron Co.*, 47 Ind. 105, cited. The lease in the case just referred to was a conveyance of all the mineral coal, limestone, iron ore, fire clay, and oil, in consideration of one dollar; and it further provided for the payment after 10 years of a rental of five dollars in advance, and for royalties on the coal, etc., and oil mined and produced. It contained the stipulation that the lessee "shall have the right to abandon said lands and mining at any time, and remove all his buildings and fixtures from said land." The court said: "This must be regarded as the creation of an estate at will. It is a stipulation which applies to the whole interest of both parties under the instrument, and every section and clause in it. The lessee has only to will it, and every part of the instrument, and every interest under it, whether of the lessor or of the lessee, is at once at an end." This language applies equally to the surrender clause of the present

lease, which is just as strong as the one under discussion, for both are as strong in favor of the lessees as language can make them. In the case of *Pidgeon* v. *Richards,* 4 Ind. 374, cited, a lease of land for a valuable consideration at the pleasure of the lessee was held to be also at the pleasure of the lessor. In the case of *Petroleum Co.* v. *Coal, Coke & Mfg. Co.,* 89 Tenn. 381, 18 S. W. 65, it was held that a mining lease for 99 years was *nudum pactum,* if construed to impose no legal obligation upon the lessee to explore and discover mines, or to work them when discovered; that such construction would convert it into a mere voluntary option, that the lessors could withdraw at any time before acceptance. Under the provisions of the lease in controversy, there was no obligation upon the lessee to explore or pay rent; but he reserved the voluntary option to surrender it at any time, without legal obligation to do anything or pay anything. Hence the lessor had the right to vacate it at any time while in an executory state. The lessees had the right at any time to say, "This lease is at an end," and thus put a complete end to the rights of both parties under it. It therefore created a mere estate at their will, and, being at their will, it was at the will of the lessor, also. There is no escape from this conclusion, and it has been the law, undisputed, from time immemorial. 2 Bl. Comm. 145; 4 Kent, Comm. 111; Washb. Real Prop. 505; Co. Inst. 55a. Nor does the three-years term agreed on change or affect this conclusion. This is merely a fixed period without binding consideration, beyond which the lessees could not hold the estate, even by their own election, though the lessor took no action. It was to terminate the estate by its own vigor, without effort on the part of the lessors. It in no sense took away the right of the lessee to terminate the estate at his pleasure, and therefore it could not do so as to the lessor, as this right, if it exists, must be mutual; for there was no valuable or enforceable consideration for it. There was noth-

ing binding the lessee to produce oil or gas. But the continuance of the lease was entirely dependent upon the commutation or forfeiture clause for both consideration and extension.

The third proposition relied on by the plaintiff is that, admitting the lease to create an estate at will, there was no notice to quit, and a number of authorities are cited to show that some notice is necessary for the protection of the party to be dispossessed. This may be by demand of possession or notice to quit. 4 Kent, Comm. 111; 2 Bl. Comm. 146. But where there is no possession, and no injury can result to the lessee, such as the loss of crops, a re-leasing of the same premises is a sufficient notice. Re-entry is always sufficient notice, but there can be no re-entry where the lessee has never been in possession. 12 Am. & Eng. Enc. Law, 757; *Kelly* v. *Waite,* 2 Bl. Comm. 146; and *Guffy* v. *Hukill,* cited in the original opinion in this case. Nor could the after reception of rent by the lessor operate as a waiver of notice in favor of the plaintiff, as against the subsequent lessees. The latter had their leases duly recorded on the 15th day of August, 1898, and thereby the plaintiff had constructive notice thereof, both at the time of its alleged payment of rent, and at the time it acquired its interest in the prior leases, to wit, the 1st day of September, 1898. It was fully advised of the appellee's rights prior to the acquirement of its interests, and legally knew that the lessor had parted with his interest to the South Penn Oil Company, and that its leases, having been thereby terminated, could not be revived by payment of rent to him, and that he had no right to receive it; but, if paid to any one, it should have been to his assigns or subsequent lessees, who had the right to refuse it, or not, at their pleasure. This is, provided the subsequent lease is valid, and not in condition to be terminated at the time of the payment of the rent under the first lease, and provided, further, that the payment of the rent

has the effect to renew or continue the life of the first lease. Strictly speaking, the money paid was not rent, but was commutation to secure the extension of the time of forfeiture for failure to complete a well within the period of six months elapsed from the date of the lease. Therefore its payment did not renew or keep the lease alive, except that it prevented its becoming invalid, under the forfeiture clause, as to the lessor, but not as to the subsequent lessees. It in no wise affected the surrender clause prior to the time of its payment. Nor did it bind the lessee to pay such commutation in the future, but this was still at his discretion. It was a mere voluntary payment for something already enjoyed, and not for future enjoyment. Hence it could not revive a lease already terminated under a different provision, or operate as a termination of the subsequent lease. Nor was the subsequent lease in the present case in a terminable condition at the time of the payment of such commutation. While the surrender clause is somewhat similar, and sufficient to render it the grant of an estate at will, terminable by either party during its mere executory existence, there are other provisions, entirely dissimilar, which, when put into execution, destroy for a time, at least, its terminable character. The forfeiture clause is in these words: "Provided, however, that this lease shall become null and void, and all rights hereunder shall cease and determine, unless a well shall be completed on said premises within two months from the date hereof, or unless the lessee shall pay at the rate of twenty-five and 50-100 dollars quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed. Such payments may be made direct to the lessors, or deposited to their credit in the Marion P. O., in Wetzel county, W. Va." This lease was executed on the 15th day of June, A. D. 1898. No pretense is made that it was terminated during the two months in which it remained in an

executory state, nor is there any pretense or allegation that thereafter the commutation of $25.50 was not paid in advance quarterly until a well was completed. The receipt of this quarterage in advance would necessarily suspend the terminable character of the estate during the time for which it was paid. In the absence of any allegation to the contrary, the presumption is that this quarterage was duly paid and received, and that the lease was at no time terminable before possession taken thereunder; and the completion of a producing well changed the lessee's right of exploration into a vested estate for five years, and so long thereafter as oil and gas should be produced in paying quantities. The commutation in the plaintiff's lease was not to be paid until after the benefits were received, and was then at its option, while in the subsequent lease it was to be paid in advance, before benefits received, and failure to pay it forfeited the lease. It is true that the plaintiff would now have the surrender clause given a different construction, but the language is too plain for misconception. It is here again repeated: "And it is further agreed that the second parties, their heirs or assigns, shall have the right at any time to surrender up this lease, and be released from all moneys due and conditions unfulfilled; then and from that time this lease and agreement shall be null and void, and no longer binding on either party, and the payments which shall have been made be held by the party of the first part as the full stipulated damages for nonfulfillment of the foregoing contract." If no payments have been made, although due, the lessor receives nothing, as all moneys due are to be released, all conditions unfulfilled to be discharged, and the agreement to be no longer binding on either party. Language could not be made stronger to relieve a lessee from all obligation at his own will and pleasure.

The fourth contention of the plaintiff is that its lease is not a *nudum pactum,* without consideration, and void by rea-

son thereof. It insists that it is made under seal, which imports consideration, and that a party to it cannot avoid it, for this reason. This would be true at law. 3 Am. & Eng. Enc. Law, 827; *Harris* v. *Harris,* 23 Grat. 738. It is not true in equity. "It is a fundamental principle of equity to refuse aid to the enforcement of executory deeds, unless founded upon either a good or a valuable consideration. The presence of a seal does not, in equity, import a consideration." It has no force. 6 Am. & Eng. Enc. Law (2d Ed.) 683; Adams, Eq. 78; Fry, Spec. Perf. § 96; Pom. Perf. § 57; *Lamprey* v. *Lamprey,* 29 Minn. 151, 12 N. W. 514; *Buford's Heirs* v. *McKee,* 1 Dana, 107. If there was any consideration for the lease, other than that mentioned in the lease, it was the duty of the plaintiff to allege it; otherwise, the contract itself is conclusive on this question. The only considerations mentioned in the lease are the royalties and rentals on oil and gas to be produced, and the commutation for failure to complete a well. The plaintiff was not bound to complete a well in any given time, or during the life of the lease, so as to produce oil royalties or gas rentals, but in lieu thereof might pay a commutation, which he reserved the right to defeat at any time before payment enforced by surrender of the lease. It was entirely optional with him to bore or not, or pay or not. He was not bound to do either, but could decline to do both. This lease is not capable of any other construction. A consideration mentioned which is not legally enforceable is equivalent to no consideration, and a contract dependent thereon is as much a *nudum pactum* as if no consideration were mentioned. "Where two parties to an instrument enter into mutual covenants which are inter-changeable considerations for each other, if either party neglects or refuses to bind himself he thus renders the instrument void for want of mutuality, and he cannot avail himself of it as obligatory upon the other, nor can he render it obligatory upon the other by any sub-

sequent act of his own, without the latter's assent." *Dodge* v. *Hopkins,* 14 Wis. 630. "Want of mutuality in the inception of the contract may be remedied by the subsequent conduct of the parties, or by the execution of the agreement." 7 Am. & Eng. Enc. Law (2d Ed.) 114, 115. Plaintiff's lease shows on its face that it was entirely optional with the lessee to perform it, or not, at its pleasure; and the Pennsylvania cases referred to in argument do not militate against this construction, for it is impossible to give it any other. In the case of *McMillan* v. *Philadelphia Co.,* 159 Pa. St. 142, 28 Atl. 220, the language, "he [the lessee] having the option to drill the well or not, or pay said rental or not," was held not to give the lessee the option to refuse to do both, but that he must do either the one or the other, to render them consistent with other provisions of the lease. The same holding was had in the case of *Jackson* v. *O'Hara,* 183 Pa. St. 233, 38 Atl. 624. These decisions are not applicable to this case, for it is impossible to construe plaintiff's lease so as to take away its optional right to surrender it at its pleasure, without paying anything therefor. The surrender clause in the lease construed in the case of *Hooks* v. *Forst,* 165 Pa. St. 246, 30 Atl. 846, is in the exact language contained in the plaintiff's lease. But the former lease contains no forfeiture clause, and in the granting clause the consideration of $1 in hand paid is acknowledged, and it is further stipulated that the lessees should pay $100 per month, beginning with the date of the lease, until a well is completed, the payments being made in advance; and the following receipt is embraced in the lease: "November the 30th, 1889. Received from Lahey, Campbell and Stoughton $100 for rent on lease in full to December the 30th, 1889." The lease also acknowledges the first payment, for the month of November. The lessor, receiving a valuable consideration for the term, could not terminate the lease until the end thereof, although it was still at the will of the lessor, who

had the right to waive his payments and terminate the lease at his pleasure. The January payment becoming due, the lessees asked for three weeks to make it, and, in case it was not then made, agreed that the lessor might consider the lease abandoned, and relet to others. The court held this to be a surrender of the lease, although it was not actually given up and that the lessees could not afterwards tender the payments due, and thereby renew it, without the consent of the lessor. The case of *Roberts* v. *Bettman,* 45 W. Va. 143, 30 S. E. 95, has no application whatever to the present case. That was a suit at law for rentals. In that case, while both parties had the right to terminate the lease,—one under the forfeiture clause, and the other under the surrender clause,—neither took the necessary steps to do so, but the lease was allowed to continue in existence for the benefit of the lessee; and the court held the lessor was entitled to his rentals until the lessee terminated the lease by a surrender thereof. It was admitted that both parties had the right to terminate it, but that neither had done so. Nor was the lease invalid for want of consideration, for the lessee stipulated to pay $100 per month in advance until a well was completed, or until he surrendered the lease, and only thereafter was he to be relieved from the monthly payments. The two clauses of forfeiture and surrender were held not to be self-acting, but to require some action on the part of one or both the parties to terminate the lease, and the termination thereof only destroyed the after-accruing rights of the parties. The plaintiff's lease, on the other hand, failed to legally bind the lessee to pay any rentals for (as claimed by it) 18 months, and then, as it now would rather not claim, on mere surrender released it from all moneys due,—a generous lease to the lessee, but unfair to the lessor. It is true that most oil leases have a surrender clause, but it is also just as true that, as to consideration, they vary as the leaves of the forests; and the consideration, in so far as the lessor is con-

cerned, governs the surrender clause. Without consideration, an executory lease may always be vacated or terminated; with valuable consideration, it cannot be. The length of the term or the character of the estate makes no difference. The courts will not enforce executory contracts not on consideration deemed good or valuable in law. *Barrett* v. *McAllister*, 33 W. Va. 738, 11 S. E. 220, has no application to this case, for the reason that the appellee's subsequent lessees are presumed to have been aware of the invalid character of plaintiff's lease at the time they obtained their lease. They knew that the plaintiff had the right to terminate, and that he could not thereafter renew it in derogation of their rights acquired for valuable consideration. Nor could plaintiff's lease be treated as an ordinary option for sale or rent, for the reason that it was for a term that might expire before plaintiff made up his mind to accept it, and thus the lessor's estate involved be lost, without a compensation to him therefor. A man offers to lease a house to another for one year, beginning at a certain date, for $100; the tenant to have the liberty to pay or not to pay the rent, if he chooses. The tenant, to make this contract binding, must either pay, or agree in advance to pay, the rent; and he cannot wait until the term expires before binding himself. Otherwise, the lessor loses his term, and receives nothing for it. If the tenant is not legally bound to pay the $100, the contract is void; for it is founded on a nonenforceable consideration, which is equivalent to no consideration. The landlord is neither bound to give the tenant notice, nor await until the expiration of any part of the proposed term, before reletting to some one else; but it is the duty of the tenant to notify him of acceptance before the beginning of the term, which he may do by paying or agreeing to pay the rent. The most that can be said of this lease is that it was no more than an option, without consideration, which might be withdrawn at any time before acceptance; and the leasing to another, with or without notice to the prior

lessee, was a withdrawal thereof. *Coleman* v. *Applegarth,* 68 Md. 21, 11 Atl. 284; *Dickinson* v. *Dodds,* 2 Ch. Div. 463; Pom. Spec. Perf. §§ 60, 61.

The fifth contention of the plaintiff is that the court erred in holding that its bill was in its nature a suit for specific performance, and subject to the equitable rules that control relief in such cases. It is probably true that the plaintiff might have brought a suit in ejectment or unlawful detainer for the enforcement of its lease, but it chose to come into equity. Counsel should not permit the ill-considered remarks of a judge to mislead them as to the law, for judges may err. Equity has the right to specifically enforce leases, and the covenants therein contained, when relief at law is inadequate. In the case of *Clay* v. *Powell,* 85 Ala. 538, 5 South. 330, it was held that a bill would lie to enforce a covenant in a lease, "upon the principles analogous to those governing the equitable remedy of specific performance." And in 22 Am. & Eng. Enc. Law, 972, the law is stated to be, "Leases of real estate, agreements to lease, and contracts in relation thereto, including covenants in contracts of lease, are enforceable specifically." The alleged ground of equitable relief is the prevention of waste or irreparable injury, but, having taken jurisdiction for one purpose, equity will go on to give full relief. *Bettman* v. *Harness,* 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566, cited. Specific execution is not confined to the making of deeds, but is the giving of any relief the nature of the case may demand. 22 Am. & Eng. Enc. Law, 1079. Equity does not merely stay waste, and send the plaintiff to law to establish its title and enforce its contract, but it goes on to specific execution thereof. Plaintiff prays that this be done; that its lease may be held to be valid and subsisting, and the subsequent leases invalid, and that it be decreed to have the exclusive right to operate for oil and gas on the lands involved; and that the subsequent lessees be enjoined from preventing it from

taking possession thereof, and be required to account for the value of the oil already produced. If this is not enforcing specific performance of this contract, what is it? It is certainly not a divorce suit, or a bill to dissolve a corporation. It is, however, an ejectment in chancery. Ejectment is the proper remedy for enforcing specific performance at law. To declare a contract valid, preserve the subject-matter thereof, and turn it over to the contractee, is certainly specific performance of such contract; the difference being that, when tried at equity or at law, the separate rules as to relief governing the separate tribunals must prevail,—one being a court of conscience, and the other adhering to legal principles. The very basis of plaintiff's suit is the enforcement of its contract, and it seeks a court of equity because of the broader and more satisfactory and adequate relief afforded. In doing so, it must submit to the rules of equity. "It is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being specifically enforced against one party, that party is equally incapable of enforcing it specifically against the other." *Marble Co.* v. *Ripley,* 10 Wall. 359, 19 L. Ed. 962. This is through want of mutuality, which governs relief both in courts of law and equity. For instance, in the present case the payment by the plaintiff of the commutation was for an expired term, and there was no binding, legal obligation on it to pay any further rental, or do or perform anything further under the lease, and the lessor was powerless to enforce specific performance thereof. Hence equity is justified in refusing relief to the plaintiff. At all times it had the lease at its will, without being legally obligated thereby. The lease, if treated as mutually terminable at will, is not unfair, but, if construed according to plaintiff's contention, it is itself the best evidence of its unfairness. Without any present consideration therefor, it seeks to bind the lessor's land for the period of three years. It assures the completion of a

well in six months, or in lieu thereof the payment of one dollar per acre per annum until a well is completed, without fixing a certain time of payment, and then provides for surrender at any time, and release of all moneys due. The forfeiture clause is clothed in such ambiguous language that highly eminent counselors and judges learned in the law differ as to its meaning, and yet "an old, feeble man, easily influenced," is expected to fully comprehend it. "Those engaged in the production of oil send agents armed with printed leases to solicit leases, and they take leases for great areas, and they are forms already prepared; and the people in many instances know little of them, are inexperienced in oil operations, and are without legal advice. They rely on the agent." Such leases should be construed most strongly against him who solicited and prepared them. *Bettman* v. *Harness,* 42 W. Va. 448, 26 S. E. 271, 36 L. R. A. 566, cited. Plaintiff insists that this lease should be construed as a whole, and so as to make it binding on the parties. It is impossible, against its express provisions, to construe it so as to bind the lessees, who reserved to themselves the right to vacate it at any time. Yet it might have been construed so as to bind the lessor, had the lessees at the proper time insisted on such construction, and complied therewith. No time is fixed for the payment of the commutation money, except that it is to be thereafter; that is, after the expiration of the six months allowed for the completion of a well. It is to be at the rate of one dollar per acre per annum. The words "per annum" were undoubtedly used to fix the rate, and not the date of payment, and for no other purpose, so that the lessees could have as well claimed that the time of payment was to be at the end of 24 as 12 months, after the expiration of the 6 months, or they might have claimed it to be at the expiration of the lease, except that would give no time for forfeiture. The plain object of this provision was to secure the completion of a well, or the forfeiture of the lease. In oil leases, generally, this com-

mutation money is required to be paid in advance of the term covered by it, so as to form an executed consideration therefor; and, in case of failure to pay, the lease becomes immediately forfeitable. In this lease it is indefinite, except that it is to be paid in lieu of, and after, the failure to complete the well within six months from its date. Then, if the well is not so completed or the rentals paid, the lease becomes null and void. A reasonable construction would be that the lessees were to complete a well within six months, and on their failure to do so, or immediately thereafter, the lease was to become null and void, unless they forthwith paid in advance at the rate of one dollar per acre per annum for an extension of the lease until such time as they could reasonably hope to secure the completion of a well, not exceeding the term limit. This would be carrying out the main purposes of the lease on the part of the lessor, to wit, the production of oil and gas, and would have changed the character of the estate from one at will to one of a fixed term. And this is the only way to construe this lease so as to render it just and equitable to the lessor. The lessee having the surrender clause for his release, the only way to bind him is to require the commutation money for a limited term to be paid in advance, thus furnishing the lessor consideration for his forbearance. Then, if the lessees fail to pay and are insolvent, the lessor can protect himself by forfeiture. But if the commutation is not to be paid until the end of the term, at the pleasure of the lessee, the only protection the lessor can have is to terminate the lease under the surrender clause. Such a construction as this destroys the plaintiff's rights, as it renders the lease forfeitable at the end of six months from its date. And this is the only construction that will make it a binding lease on the plaintiff at that date. In all such cases the commutation money should be payable in advance, unless there is a valuable consideration which will make it nonforfeitable for the term the lease is to run.

The lease from which this one was evidently copied (*Hooks* v. *Forst,* 165 Pa. St. 246, 30 Atl. 846) required such advance payment; but the draftsman of this evidently wanted to place the lessee in condition to surrender the lease at any time without being obliged to pay the commutation money or other rental. It may have been through ignorance. But, ignorance or not, he dug the pit and his friend fell into it. Many do likewise. He is not the only pebble.

The sixth and final contention of the plaintiff is that the court ignored the plaintiff's claim to the one-eighth of the oil, being the royalty due the lessor, which is a point in argument insisted as fairly arising on the record. This is a point that has not been properly presented to, or decided by, the circuit court, and therefore does not fairly arise upon the record, but is unfairly presented here. The appeal in this case was from the order dissolving the injunction for want of equity. The relief sought is not against the lessor, but his subsequent lessees; and the prayer is not for the oil in kind, but that an account might be taken of the amount and value of the oil, and that the South Penn Oil Company might be required to pay the value thereof to the plaintiff. The ground for jurisdiction in equity was the staying of waste, and the prevention of irreparable injury. In upholding the subsequent leases, the court decided the equities against the plaintiff; and if it has a claim to the royalties, or the value thereof, the remedy at law is ample. It is only a pecuniary question, which can be compensation in damages, or the royalty can be recovered by appropriate action. Neither the South Penn Oil Company, the pipe-line company to whom the oil is delivered, nor the common lessor, is shown to be insolvent. There are no sufficient allegations touching this royalty alone that will give equitable relief. Not only is this true, but it is also a serious question whether the plaintiff can set up any claim to this royalty under its lease by virtue of its payment of the commutation money. As heretofore shown, this money

was paid for an expired term, and not for a future term. Plaintiff's lease does not legally bind it to pay anything for a future term covering the time of the production of this royalty, but it may terminate the lease at any time by surrender, and be released from all moneys due or to become due. Hence it cannot have this royalty, not having paid the consideration therefor, without the assent of the lessor, who has not been properly impleaded in relation thereto. The commutation already paid is for a past term, when neither of the lessees had possession of the land. Its payment is equivalent to sinking a dry hole. *Steelsmith* v. *Gartlan,* 45 W. Va. 27, 29 S. E. 978. The subsequent lessees then entered, and found oil, and began producing the royalty. It does not appear whether the plaintiff paid the annual commutation money, which, according to its own contention, would come due on the 11th day of November, 1899, instead of in advance on the 11th day of November, 1898; and, if it was not so paid, its lease would certainly now be forfeited, and it would have no claim to the royalty.

All these various contentions of the plaintiff for a rehearing are wholly untenable, without legal support, and do not justify a continuance of this litigation. The rehearing should be refused.

Affirmed.

J. C. TREES v. ECLIPSE OIL CO. ET AL.

(47 West Virginia 107; 34 S. E. 933. Supreme Court of Appeals. Nov. 28, 1899.)

[1]**Unilateral oil lease.** An executory oil and gas lease, which does not bind the lessees to carry out its covenants, but reserves to them the right to defeat the same at any time, and relieve themselves from the payment of any consideration therefor, is invalid to create any estate other than the mere optional right of entry, which is subject to termination at the will of either party.

Decease of lessor. Such executory lease is terminated by the death of the lessor.

[2]**Rights of lessee of part of the owners.** A person holding a valid executory oil and gas lease, executed by several of a number of cotenants, has such an inchoate interest in the land subject to such lease as will enable him to maintain an injunction to prevent a wrongdoer from committing waste by the extraction of oil and gas.

Appeal from Circuit Court, Wetzel County; G. W. FARR, Judge.

Bill by J. C. Trees against the Eclipse Oil Company and others. Decree for plaintiff. Defendants appeal. Affirmed.

HUBBARD & HUBBARD, J. B. SUMMERVILLE, and ROBERT MCELDOWNEY, for appellants.

[1]*Eclipse Co.* v. *South Penn Co.*, 20 M. R. 234.

Construction of lease terminable at will of either party. *Diamond Co.* v. *Curless*, 19 M. R. 682.

Construction of agreement termed a lease wherein the owner reserved exclusive control of the mine: *Held*, a contract of employment, terminable at will. *Lambie* v. *Sloss Co.*, 118 Ala. 427; 24 So. 108.

Where dead rent is provided for, lessee is liable although he never took possession; he "retains" the premises until he surrenders. *Jamestown Co.* v. *Egbert*, 152 Pa. 53; 25 Atl. 151.

[2]*Colo. F. & I. Co.* v. *Pryor*, 19 M. R. 544.

T. P. JACOBS, GEORGE L. ROBERTS, and CHARLES GIBBS CARTER, for appellee.

DENT, P. The Eclipse Oil Company appeals from a decree of the circuit court of Wetzel county, overruling its motion to dissolve an injunction obtained against it by J. C. Trees, restraining it "from constructing and erecting any oil derrick or rig and machinery upon the tract of 200 acres of land known as the 'John Hafer land,' lying in Proctor district, Wetzel county, and also from drilling or boring oil or gas wells on said tract of land." The defendant claims under a similar lease in all respects, as the one passed on in the case of the Eclipse Oil Company against the South Penn Oil Company at this term of the court; and the same objections that apply to that lease are also present in this one. It was executed by John Hafer, now deceased, on the 16th day of August, 1898, and nothing was done in any manner in furtherance of the objects thereof during his lifetime. Some time after his death, and just within 18 months of the date of the lease, the Eclipse Oil Company, assignee of the lessees, claim to have paid the annual rental provided for in case of failure to complete an oil well within 6 months to the administrator of the deceased, and that the same went into, and was distributed as a part of his estate. Prior to such payment the widow and heirs of the deceased, some of whom were infants, executed an oil and gas lease to the plaintiff, Trees, on the same tract of land. After this last lease was executed the defendant entered upon the land, and began preparations for sinking a well. This injunction followed. As held in the case of *Eclipse Oil Co.* v. *South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923, the lessees not being bound to comply with any of the covenants or stipulations of the lease with regard to boring for oil and gas or the payment of the rent, but having the reserved right to vacate the lease at any time they might see fit, and then wholly escape its obligations, the lessor was

entitled to do likewise; thus rendering it a mere right of entry, to be terminated at the will of either party thereto while it remained in an executory condition. Such being its character, the death of John Hafer put an end to it. 12 Am. & Eng. Enc. Law, 758b. The defendant's lease being invalid, its act in entering on the land for the purpose of boring for oil was wrong and a trespass to which any of the co-tenants or their lessee had the right to object; and, while the lessee's right to explore for oil was not perfected, yet he had such an inchoate right that a court of equity will protect against a trespasser or wrongdoer. While one co-tenant may not bore for oil, he can prevent others from doing so, whether they are co-tenants or trespassers. And he may transfer this right to a lessee. A gas and oil lease carries with it such authority. By payment of rentals to the administrator, the defendant could not revive its defunct lease. As the real parties to the injunction were before the court, the objection that other persons were necessary to the suit, whose interests were involved therein, could not arise on a preliminary motion to dissolve such injunction. The plaintiff having shown a strong equitable right, the injunction should be continued until the final hearing. The decree is affirmed.

Affirmed.

C. D. UHL v. THE OHIO RIVER RAILROAD CO.

(47 West Virginia 59; 34 S. E. 934. Supreme Court of Appeals. Nov. 28, 1899.)

[1]**Pipe line across railroad. Way of necessity.** Where a party has conveyed to a railroad its right of way he retains by implication a right of way of necessity under the railroad bed to conduct natural gas to his residence on the premises out of which the original right of way was granted.

Appeal from Circuit Court, Wood County; LEWIS N. TAVENNER, Judge.

Bill by C. D. Uhl against the Ohio River Railroad Company. Decree for defendant, and plaintiff appeals. Reversed.

McCLURE & FORRER, for appellant.

H. P. CAMDEN, for appellee.

DENT, P. C. D. Uhl appeals from a decision of the circuit court of Wood county dissolving an injunction obtained by him against the Ohio River Railroad Company in words as follows: "To restrain, inhibit, and enjoin the Ohio River Railroad, its agents, employees, attorneys, and servants, from interfering with complainant's use of his crossing in laying pipe lines over the right of way of said railroad company to complainant's residence, to run through same gas and oil

[1]Convenience distinguished from necessity. *Reliance Co.* v. *Kentucky Co.*, 17 M. R. 609.

Construction of grant of right of way to carry coal. *McCracken* v. *Gumbert*, 17 M. R. 279.

Grant of right of way to work quarry construed as conveying an easement appurtenant to the dominant estate and running with the land. *Stovall* v. *Coggins Gr. Co.* 116 Ga. 376; 42 S. E. 723.

produced from complainant's land lying between said railroad and the Ohio river, but to be so laid or constructed as not to interfere in any wise with said railroad company's use and occupation of its road, its rails, cross-ties, track, or operation of its said railroad, until the further order of the court." The admitted facts are as follows: The appellant on the 13th of April, 1882, granted a strip of land 50 feet wide, dividing his farm, to the appellee, as a right of way for its railroad, without reservation, except, as a part of the consideration, that the grantee should make a good roadway or crossing where the private road of said Uhl crosses said railroad, and also put in or build cattle stops wherever said railroad comes from one field to the other. This grant has been held, in this court, in a case decided herewith between said parties, to invest the appellant with the fee simple of said strip of land. The appellant at the time of his grant knew nothing with regard to his land being underlaid with oil and gas, and made no reservation respecting the same. Gas in paying quantities has been found on the land on the opposite side of the right of way from his dwelling house, and appellant sought to convey it under the railroad through a pipe for use at his residence. The appellee refused to permit him to do so, and he obtained this injunction. He claims the right to do so (1) because of the roadway or crossing before mentioned; (2) by implication of law, through necessity. It would not, certainly, come under the first, for the reason that this is a crossing over the railroad, and was intended to be the customary farm roadway. No thought was had of gas or oil at the time of its reservation, and no provision was made in relation thereto. And it cannot be said the parties had in contemplation at that time things that in no wise entered their minds, and of which they were both equally and entirely ignorant. There is no doubt but what the appellant, if he had then entertained even the remotest prospects of gas and oil developments, would have made every necessary reservation

in relation thereto. Is there a way implied by necessity? Certainly not as to the oil, for it can be secured in barrels or tanks, or reduced to such condition that it can be transported across the present roadway without the use of an underlying pipe line. At least, there is nothing to show such necessity disclosed by the record. Gas is entirely different. The only way it can be conveyed from one point to another, so as to be of practical utility, is through confinement in pipes. Otherwise, it is lost, although when properly conveyed, and used for heating and lighting, it is of the greatest value and comfort. It is being produced on the appellant's land. He cannot convey it to his dwelling house, and get the benefit of it, without crossing the right of way donated by him to the appellee. The appellee refuses to allow him to do so, for love or money, except probably at an exorbitant price. The excuse is that it will endanger the running of its cars. The court will take judicial notice of the fact (being common knowledge to all men) that gas can be so confined in pipes that it can be transported across the right of way in a perfectly harmless manner. In Jones, Easem. § 315, it is said that: "A right of way is never implied because it is convenient. It must be necessary for the reasonable enjoyment of the estate,"—that is, the beneficial use and enjoyment. And in section 319: "But the fact that one has a right of way by grant or reservation, for a limited or special purpose, does not debar him from a way of necessity for all purposes." "A way of necessity arises by an implied reservation, * * * as well as by an implied grant." Section 306. It "presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold, if he can reach it in no other way." "Even where one conveys to a railroad company a right of way through his land, he has a way of necessity over the land conveyed, so as to reach a part that is cut off by the railroad." Section 307. "The prevailing view in this country is that

a way of necessity is not limited to such use of the land granted as was actually made or contemplated at the time of the conveyance, but is a way for any use to which the owner may lawfully put the granted land at any time." Section 323. "The way implied is usually one for all purposes for which the grantee may need to use it for the full enjoyment of the property conveyed" or retained. Section 324. "Such ways are implied in direct contradiction to the grantor's covenants of general warranty." Section 305. The implication of necessity is a mere fiction of law, for public policy, to secure to the owner the full enjoyment of his estate in grant or reservation, and which he would be otherwise entirely deprived of by the pure obstinacy of his grantor or grantee. This is a plain case of dog in the manger. What it cannot eat it will not let others eat. It is certainly a matter of gratification that the law permits the polite removal of the obstruction. The cases relied on by appellee's counsel are not against, but rather in favor of, this conclusion. The principal case of *United States Pipe-Line Co.* v. *Delaware, L. & W. R. Co.*, 41 Atl. 759, 42 L. R. A. 572, was an attempt by the pipe-line company to lay a pipe-line for public use through the right of way of a railroad company, by reason of a private right of way reserved by the adjacent landowner. The court held that this could not be lawfully done, for the reason that: "The laying of these pipes in the roadway in no sense conferred a benefit on the lands to which the way was appurtenant, nor were the pipes adapted to facilitate or promote access between the two parcels of land to which the easement was appurtenant. They extend underground the entire distance of the way, and are designed to be used as a part of a pipe line for the purpose of conveying oil." The injunction in this case limits the pipe line "to facilitate or promote access between the two parcels of land to which the easement was appurtenant," and it confers "a benefit on the lands," and is an absolute necessity to their reasonable

and proper enjoyment by the owner thereof. For these reasons the judgment of the circuit court is reversed, the injunction is so modified as to strike out the words "and oil," making it apply to gas alone, and the cause is remanded to the circuit court to be further proceeded in according to the rules and principles governing courts of equity.

BRANNON, J. I concur for the reason that I think the crossing reserved in the right of way deed gives the right to put in the piping. Though such a use of that crossing may not have been dreamed of at the date of the deed, yet the crossing was for use for any purpose which might thereafter be called for in the conveyance from the land of its products, —whether a wagon carrying wheat or coal, or a pipe or other appropriate means of carrying gas,—so it did not practically impair the use of the right of the railroad to use its track. If you say this reserved crossing does not include the right to this pipe easement, because it was not thought of, then how can you concede the right for the same use at other points in the line of right of way? Neither was it thought of then. It grows only from implication. Counsel, after I had written this note, cited *United States Pipe-Line Co.* v. *Delaware, L. & W. R. Co.*, 41 Atl. 759, 42 L. R. A. 572, to show that, under a right of way reserved, an oil pipe cannot be laid; but that was where a third party wanted to lay it for conveyance of oil for the public, not an owner of land to convey the product of his land, for which the right was reserved. It may be that, if that reservation of a crossing were absent, there would be a right of way of necessity. In *Watts* v. *Railroad Co.*, 39 W. Va. 203, 19 S. E. 521, 23 L. R. A. 674, I indicated that where no crossing is reserved none exists; but that opinion did not relate to a way of necessity. Where there is no other ingress or egress, save over the track, a way of necessity may exist; but, it not being necessary to base the decision on that, I prefer to reserve that question. 3 Elliott,

R. R. § 1138, questions whether a grant of a strip for a railroad gives impliedly a right to a crossing between the parts of the land severed by it, by implication. I do not think it would for mere convenience. It might from necessity. It is as clear that a way of necessity may be regarded as reserved by implication to one who conveys one tract, or part of one, retaing the other or balance, as it is conferred by implication in favor of a grantee under proper circumstances. See cases cited in Jones, Easem. §§ 306, 307; 3 Elliott, R. R. *supra; Carbrey* v. *Willis,* 83 Am. Dec. 688, and note; *Elliott* v. *Rhett,* 57 Am. Dec. 750, and full note. Can the party make a pipe line wherever he chooses, and endanger the road?

Reversed.

JAMES MULDOON ET AL v. WILLIAM BROWN ET AL.

(21 Utah 121; 59 Pac. 720. Supreme Court. Dec. 1, 1899.)

Admissions by one of several locators. In an action to determine ownership and right to possession of certain mining ground, evidence of statements, of one of several plaintiffs, as to the antedating by him of the location notice, made in the absence of his coplaintiffs, and not concurred in by them, is hearsay, and inadmissible to bind them.

[1]**Fraud, when relied upon as a defense, must be specifically pleaded** in an answer as well as in a complaint; and, where fraud in making a mining location is not charged in the answer, evidence of admissions and declarations of the locator in relation to such location, tending to show fraud on his part, is inadmissible.

Antedating notices. Where a locator of a mining claim on government land fraudulently antedates his notice of location for the purpose of defeating an actual locator thereon, such location is fradulent as against such rightful claimant, and is also fraudulent as against the government.

The date of the location required to be given in the notice means the correct date, and not a fictitious or fraudulent date.

(Syllabus by the Court.)

Appeal from Fifth District Court; E. V. Higgins, Judge, Juab County.

Action by James Muldoon and others against William Brown and others. Judgment for defendants, and plaintiffs appeal. Reversed.

[1]The second syllabus of the text case defeats the practical application of the third. As we understand it, a fraud against which a plaintiff seeks relief must be alleged and strictly proved. The same where defendant charges plaintiff with fraud as a defense to plaintiff's demand. But where each party must make out an affirmative case (which must be assumed to be an honest case) it seems a strange rule that because the other side had not foreseen and pleaded it, he should be precluded from probing the plaintiff's case for fraud, which perhaps first appears on plaintiff presenting his showing. *M. & DeS.* See *Rush* v. *French*, 25 Pac. 828, as to liberty of full cross examination in case between hostile locations; also *Fissure Co.* v. *Old Susan Co.*, 22 Utah 438; 21 M. R. —.

W. C. HALL, for appellants.

H. L. PICKETT, for respondents.

MINER, J. In 1898 respondents filed an application for a United States patent to the Gold Haven lode mining claim in State Line mining district, Iron county, Utah. Appellants thereafter filed their adverse claim and protest to said application for a patent as owners of the Blackbird mining claim, in said district, and commenced this action to determine the ownership and right of possession to the premises in question, claiming a conflict area between said mining claims, and asked for a determination of the right of patent to said conflicting area.

The Gold Haven claim covers a large part of the Blackbird claim. Appellants, plaintiffs below, claim that the Blackbird claim was located by the appellants on the 28th day of April, 1896, and was recorded on the 14th day of May, 1896. The Gold Haven mining claim was located on the 15th and recorded on the 16th day of May, 1896, by William Jewell, William Brown, and Joseph Arcadi, and ——, who transferred his interest to defendant Turner.

Defendants made their discovery and built their monument on the south end of their claim on May 15, 1896, and before proceeding further they discovered the monument and notice of the Blackbird claim, and thereafter called upon one of the plaintiffs to stake his claim, so they could place their stakes properly. This said plaintiff declined to do, and the defendants thereafter continued the staking of their claim.

It appears that plaintiffs' location notice of the Blackbird claim was dated April 28, 1896, and, while the testimony is very conflicting and unsatisfactory, it also appears by defendants' testimony that this notice was posted on the 13th day of May, but was dated back to the 28th day of April, 1896,

for the purpose of defeating the claim of one Thompson, who seems to have had some interest in the ground.

On the trial of the case, the court, under objection, admitted the testimony of William Jewell, a witness for the defendants, to the effect that Plaintiff Clark told him that Kelly had informed him that he located the Blackbird claim on the 13th day of May, 1896, but had dated the location notice back to the 28th day of April, 1896, in order to beat Thompson out of a prior location.

The testimony of Mr. Brown, a witness for the defendants, was admitted, under objection, to the effect that plaintiff Clark had told him the date of the location notice was dated back to April 28th, to beat Thompson. A motion was afterwards made to strike out this testimony, which motion was denied.

The testimony of Higbee, another witness for the defendants, was admitted, as to the statements of Clark and Kelly concerning the dating back of the location notice. It was objected that such testimony could not bind the other parties plaintiff; that, as against such parties, the testimony was wholly incompetent; and that the statements of Clark as to what was told to him by Kelly were hearsay and incompetent, and could not bind Muldoon.

It is also urged that no allegation of fraud in the location of the Blackbird claim, or of estoppel, is alleged in the complaint.

It appears from the decision of the court that the testimony in question was considered by it in the determination of the case. Such testimony, doubtless, had much weight with the trial court in arriving at its decision.

We are satisfied that the admission of this testimony was erroneous, as against the plaintiffs in the case, who were not present, and did not make, or concur in the making of, the statements and admissions. The testimony of Jewell as to

what Clark told him that Kelly had told Clark was inadmissible, as being hearsay, as to Kelly and Muldoon, who were not present. Such admissions and declarations were also inadmissible, under the answer, for the reason that no fraud was charged in the answer as a ground for setting aside the location of the Blackbird claim, and no claim is set up that the plaintiffs acted fraudulently in dating back their notice of location, or that defendants were injured thereby.

The dating back of the location notice, for the purpose of defeating other claimants to the land covered by the notice, was a fraud upon the parties sought to be defeated, and it may also be a fraud upon the government. If such location notice is fraudulently dated anterior to the time of its actual location, in order to place the claimant's location in advance of or more advantageous to that of another locator, it should be considered as fraudulent; and when a party seeks to avoid the effect of such notice, relying upon such fraud, the fraud should be pleaded.

Section 2324, Rev. St. U. S., requires that "all records of mining claims heretofore made shall contain the name or names of the locators, the date of location, and such a description of the claim or claims located by reference to some natural object or permanent monument, as will identify the claim." It must contain—First, the name of the locator; second, the date of the location; and, third, a description of the claim, etc. Barringer & A. Mines & Min. p. 242.

The date of the location is a material fact, and means the correct date; not a fictitious, fraudulent, and incorrect date, inserted for the purpose of defeating some other claimants out of their just rights, or to defeat a location then being made.

The evident purpose of the evidence offered was to show fraud upon the part of the plaintiffs in making their location, or that they were estopped from claiming under the

entry in their case. This testimony was inadmissible, under the pleadings.

In *Wilson* v. *Sullivan,* 17 Utah, 341, 53 Pac. 994, this court held that "fraud, when relied upon as a defense, must be specifically pleaded in an answer as well as in a complaint; and the facts and circumstances relied upon should be set out, in order that the court may know whether there was such fraud as will be of avail to the pleader, and also that the party charged with fraud may know the nature of the charge, and be prepared to meet it."

A similar rule applies to estoppel. *Feversham* v. *Emerson,* 5 Morr. Min. R. 500; *Kelly* v. *Taylor,* Id. 598; *Boggs* v. *Mining Co.,* 10 Morr. Min. R. 334; *Clarke* v. *Huber,* 25 Cal. 594.

In case of another trial, either party should be allowed to amend their pleadings, if they so desire, upon such reasonable terms as the trial court may impose.

After considering the whole case, we have determined to reverse the judgment, and remand the case for a new trial. On such trial, on opportunity will be given each party for a full hearing upon such admissible testimony as may be offered, and in that way the court may be able to arrive at a just conclusion upon the merits of the respective claimants, which now appear to be clouded in inexplicable uncertainty.

The judgment of the district court is reversed, and the cause remanded, with costs to the appellants, and a new trial is ordered.

BARTCH, C. J., and BASKIN, J., concur.

MATILDA MCGREGOR ET AL. v. THOMAS B. CAMDEN ET AL.

(47 West Virginia 193; 34 S. E. 936. Supreme Court of Appeals. Dec. 2, 1899.)

[1]**No lawful business can be per se a nuisance.** Whether an oil and gas well be a nuisance to a neighboring dwelling depends on its location, capacity and management.

Facts which make it a nuisance. When such a well has such capacity, management, and location with regard to a dwelling house and its appurtenances as to materially diminish the value thereof as a dwelling, and seriously interfere with its ordinary comfort and enjoyment, it is an abatable nuisance.

If there is any way that such well can be operated so as not to make it a nuisance, only the unlawful operation thereof will be enjoined.

Appeal from Circuit Court, Ritchie County; R. H. Freer, Judge.

Action by Matilda McGregor and others against Thomas B. Camden and others. From a decree dismissing the bill, plaintiffs appeal. Reversed.

[1]*Strobel* v. *Kerr Salt Co.*, 164 N. Y. 303; 21 M. R. —.

Operator bound to use all practicable means to prevent discoloring water. *Sterling Co.* v. *Spark's Co.* 54 N. J. Eq. 65; 38 Atl. 426.

Right to destroy dams. Injunctive relief against tailings denied because injury too remote. Prescription in such cases. *Blair* v. *Boswell*, 37 Oreg. 168; 61 Pac. 341. *Turner* v. *Locy*, 37 Oreg. 158; 61 Pac. 342.

A gas well is not *per se* a nuisance. *Windfall Co.* v. *Patterson*, 18 M. R. 674.

Mine enjoined from polluting waters of stream used by distillery. *Young* v. *Bankier Distillery*, L. R. App. Ca. 691 (1893).

Depositing ground sluice debris in river held an enjoinable nuisance. *Yuba County* v. *Kate Hayes Co.* 141 Cal. 360; 74 Pac. 1049.

Ruling on evidence in action against smelter for killing orchard over one mile distant from its smoke stacks. *Rowe* v. *Northport Co.*, — Wash. —; 76 Pac. 529.

Hall & Hall and B. F. Ayers, for appellants.

Camden & Moss, for appellees.

Dent, P. Matilda McGregor et al. against Thomas B. Camden et al., from the circuit court of Ritchie county; being an appeal from a decree dismissing a bill praying an injunction against an oil and gas well. The facts are as follows: The plaintiffs are the owners of a valuable lot and dwelling house and appurtenances, alleged to be worth about $10,000, situated in the town of Cairo, said county. The lot is highly improved for the purposes for which it had been used for the past 25 years, to wit, as a home for the McGregor family. Mrs. McGregor now occupies the same as life tenant, while the remainder is in her children, joint plaintiffs in this suit, but who have married and live elsewhere. Adjacent to this property is another lot 85x115½ feet, on which certain of the defendants began sinking an oil well in the year 1896, within 70 feet of the dwelling house, and about 50 feet of the line of the lot, towards such house, and 15 feet in another direction to the McGregor land. The plaintiffs obtained a temporary injunction in its early beginning to restrain the sinking of the well so close to their property. This injunction was afterwards modified so as to permit the defendants to proceed with their well on giving bond in the penalty of $10,000, good for the period of 40 days. The plaintiffs then filed an amended bill, making new parties, and amending the allegations in some respects, and obtained a virtual reinstatement of their injunction, to be effective after the expiration of the 40 day bond limit. Some of the defendants tendered answers, to which the plaintiffs excepted. Some of the defendants have as yet filed no answers. On the 26th day of January, 1897, the following vacation order was entered of record, to wit: "Notice having been given by the defendant J. H. Kelly

of a motion to dissolve the injunctions and orders of injunction made in this case on the original and amended and supplemental bills, to be heard on January 14, 1897, and the plaintiff having given notice of a motion to reinstate the injunction on the original bill filed in this case, which notice was accepted by B. M. Ambler, of counsel, on behalf of J. H. Kelly and others, owners of the lease covering the lot on which is located the well in controversy, which motions were noticed to be heard at Harrisville on the 14th day of January, 1897, and the parties having by a stipulation in writing agreed that the argument on the questions presented should be heard before the undersigned Judge, for greater convenience, at Parkersburg, at 306 Juliana Street, that stipulation is ordered to be made part of the record, and to be copied on the chancery order book as a part of this order; and the motions aforesaid coming on to be heard upon the orders and proceedings heretofore had, and upon the amended and supplemental bill, and upon certain depositions taken by the plaintiffs, and upon the demurrer and answer of the defendant J. H. Kelly to the amended and supplemental bill, and upon exceptions to the answers of J. H. Kelly and others indorsed thereon by plaintiffs, and upon the motions to dissolve said orders of injunction at the instance of the defendants, and to reinstate the injunction of the original bill, and the court having heard the arguments of the counsel, according to the stipulation, on the matters arising in the record, it is now, on this 22 day of January, 1897, at New Martinsville, and within the circuit of which the undersigned is judge, ordered that the order of injunction entered in this cause upon the amended bill by the Hon. Thos. P. Jacobs, late judge of said circuit, be, and the same is hereby, dissolved and set aside, and the court refuses to reinstate the injunction on the original bill, and overrules the exception to the answer of J. H. Kelly and others, and that the defendants be, and are hereby, re-

lieved from all orders of injunction heretofore entered in the cause. Romeo H. Freer, Judge 4th Judicial Circuit." And on the 9th day of March, 1897, the bills were dismissed at the costs of the plaintiffs.

There are numerous technical objections urged in this cause that are hardly worthy of consideration. One is that the original bill was not properly verified. Section 3, c. 133, Code, provides that "no injunction shall be awarded in vacation nor in court in a case not ready for hearing, unless the court or judge be satisfied by affidavit or otherwise of the plaintiff's equity." Whatever satisfies the judge of plaintiff's equity is sufficient, whether the bill be sworn to or not. The judge being satisfied, no one else can object. Such objection after the injunction is granted can amount to nothing but a mere legal quibble. The main facts on which the bill is founded are not even denied, the only controversy between the parties being the question as to whether a gas and oil well can be so sunk and operated as not to be a nuisance to a dwelling house and lot within 70 feet of it. The bare statement of the case would apparently make it prima facie a nuisance. The noise and rumbling of steam-running machinery at all hours, both day and night, until they become accustomed to it, would be a great source of annoyance to most persons; and then the inflammable, destructive, and dangerous character of both oil and natural gas issuing from a producing well, and discharged in the air or stored in quantities, are matters of common understanding; and when situated so near a dwelling house and grounds as to become an impending and threatening danger to the property and inmates thereof, so the proper enjoyment of such property is greatly interfered with, if not entirely destroyed, a court of equity is justified in abating the same as a nuisance, unless it appears that such well can be operated without danger to such dwelling house. Nor can this matter be determined by waiting until the property is actually destroyed.

Such delay would be in its nature criminal. A lawful business cannot be a nuisance per se, but from its surrounding places and circumstances, or the manner in which it is conducted, it may become a nuisance. *Manufacturing Co.* v. *Patterson,* 148 Ind. 414, 47 N. E. 2, 37 L. R. A. 381; *Powell* v. *Furniture Co.,* 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; *Kinney* v. *Keopmaun* (Ala.) 22 So. 593, 37 L. R. A. 497; *Wilson* v. *Manufacturing Co.,* 40 W. Va. 413, 21 S. E. 1035. The last case refers to the keeping and manufacturing of powder near a public place. In the case of *McAndrews* v. *Collerd,* 42 N. J. L. 189, it is held that the "keeping powder, nitro-glycerine, or other explosive substance in large quantities in the vicinity of a dwelling house or other place of business is a nuisance per se, and may be abated by action at law or bill in equity." This is quoted approvingly by Judge Brannon in the case of *Wilson* v. *Manufacturing Co.,* above cited. In the case of *Cook* v. *Anderson,* 85 Ala. 99, 4 So. 713, it was held that "keeping explosive substances in large quantities in the vicinity of dwelling houses or places of business is ordinarily regarded a nuisance,—whether or not being dependent upon the locality, the quantity, and surrounding circumstances." If the keeping of such substances, which necessarily include oil and natural gas, near a dwelling house or place of business, may be a nuisance, what may be said of boring into the earth, and turning them loose from their safe confinement, and allowing them to spread ad libitum over and through a dwelling house? Natural gas is known to be easily ignitable, and highly explosive, and to be very dangerous, owing to its stealthy and rapid approach. Naphtha gas, arising from crude petroleum oil, is said to be more explosive than powder. In this case we have the natural gas from the well, petroleum, and the gas therefrom in its storage tank, all to deal with as dangerous and threatening to plaintiffs' property. As the drilling has ceased, the noise attending it has, likewise, ex-

cept that arising from the pumping operation, about which nothing is alleged or proven.

The bills, on demurrer, make out a strong case of nuisance against the defendants, and therefore the demurrer should have been overruled. They do not allege, however, that this well cannot be operated without danger or loss to plaintiffs' property, although there are allegations from which this might be implied. Nor is this a matter of common knowledge, as there is little, if any, human experience to be had in this direction, as but few oil wells have ever been located in so close proximity to a valuable home property. The evidence of the most expert and competent witnesses could alone shed light on this subject. The court cannot say without such evidence that the well could be operated without such danger and loss. The drilling of oil and gas wells is not only a legitimate business, but public policy upholds it, as being for the general welfare. *Uhl* v. *Railroad Co.* (decided at this term) *ante,* 263. Yet public policy itself is qualified by the constitutional provision that private property shall not be taken or damaged for public use without just compensation. So public policy will not justify the maintenance of an oil well that is a nuisance to private property. The defendant Kelly, who appears to answer for all the defendants, admits many of the allegations of the bill, denies that it has so far damaged the plaintiffs' property to any considerable extent, alleges that the well "is a paying well, and is now being operated with all the prudence, care, and skill known in the business," but does not claim that such well can be so operated as to prevent any appreciable danger to plaintiffs' property from fire and gas. The proofs appear to establish the fact that the well and tank are an impending evil, continually hanging over the plaintiffs' property,—as much so as the storage or manufacture of powder in quantities could possibly be,—and that it is in danger of destruction by fire by day and by night. There are no

waterworks or fire protection of any kind, and if fire once got under headway it would be impossible to stop it until stayed by the entire destruction of all plaintiffs' buildings, and, if in the night-time, probably life itself. It is a hardship to stop the pursuit of any lawful business, and equity does not do it except in a plain case. If the business is merely for pecuniary profit, and threatens loss to another which cannot be compensated in damages, such as the destruction of an old, established home, the speculator has no right to complain because he is restrained from doing acts lawful in themselves, but which become unlawful because they ruthlessly interfere with the long-established rights of his neighbor. He must use his own without damaging his neighbor.

From the vacation order recited, it is hard to tell on just what state of the pleadings the circuit court decided this case. It was submitted on bill and demurrer thereto, answers of J. H. Kelly tendered, and exceptions thereto, affidavits and depositions, and motion to dissolve the injunction. If the judge regarded the answers as though replied to generally, and read the plaintiffs' depositions, a good prima facie case for injunction was made out, and the injunction should have been continued to the hearing; but if he regarded the answers in without replication, then, in so far as they controvert the bill, they must be taken as true, and would be decisive of the case, for the depositions could not be considered in opposition to the admission of the truth of the answer. 2 Tuck. Bl. Comm. 479. It is there said: "If the plaintiff does not reply to the answer, but the cause is set down for hearing upon bill and answer, without replication, the answer is to be taken in all things as true." "In injunction cases, as we have said, the defendant may file his answer the day before the commencement of the term, and move even the next day for dissolution. Here the motion may come on without replication, but the answer is to be taken and

considered as if there was a replication." In this case the plaintiffs never had an opportunity to reply to the answers, for the judge acted upon them at the same time he overruled the exceptions thereto, all of which was done in vacation, in the absence of both plaintiffs and defendants. It must therefore be presumed that the judge considered such answers as though put in issue by general replication. Looking at it in this light, the only proofs in the case are those taken by the plaintiffs. From these it appears that the defendants' oil well has already scattered oil and salt water and gas over and through plaintiff's premises; that she has already had to put out all her fires twice on account of the danger from gas (once being notified so to do by defendants' employés), and these things are liable to occur again at any time; that the defendants are storing oil from the well in an ordinary oil tank within 80 feet of such dwelling; and that the danger of fire therefrom is imminent and threatening. The plaintiffs could hardly prove any more without waiting until their buildings and property were destroyed, and then bring that in as proof positive that a nuisance once existed, but this would be too late for relief by injunction. Plaintiffs' proofs undoubtedly made a prima facie case of nuisance, which entitled them to have the injunction continued until a final hearing.

Attention is called to the use of the phrase "if any," so often repeated in the bill. This refers solely to the salt water, and is used for the reason that plaintiffs did not know whether salt water was or would be present or not in the output of the well. There is much immaterial matter contained in the answers, which rather prejudice the defendants in a court of equity than otherwise. They claim that the well is necessary to secure the oil and gas under the 85x115½ feet of ground, worth about $4,000. That this is false, the defendants established themselves, by locating their well within 15 feet of the line of the McGregor land. Nor was

any such attempted misleading allegation necessary, for the reason that, while oil and gas in place are regarded as real estate, yet, being fugitive in nature, they are not the absolute property of the landowner until he reduces them to possession, and they become the property of him who first lawfully makes this reduction. They are the property of the landowner in the earth, just as the air and water are his above the earth. And his neighbor has just the same right to drill an oil or gas well as he has to dig for water or erect a windmill on his own land. *Uhl* v. *Railroad Co.,* above cited. There are two questions of fact to be finally decided in this case: First. Is this oil well, as now operated, such a nuisance to the plaintiffs' property as to materially diminish the value thereof as a dwelling, and seriously interfere with the ordinary comfort and enjoyment of it? *Adams* v. *Michael,* 38 Md. 123. The burden of establishing this is on the plaintiffs. Second. Is there any way in which this well can be operated so as not to materially diminish the value of the property as a dwelling, and seriously interfere with the ordinary comfort and enjoyment of it? If there is, equity will permit it to be so operated, but enjoin the continuance of the unlawful operation. As to these questions, the court, at the request of either party, or on its own motion, may direct an issue to be tried by a jury. Section 4, c. 131, Code; *Powell* v. *Furniture Co.,* 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53. The principles involved in this case are too important, both to the public and property owners, to be disposed of without due hearing and careful consideration. The final decree dismissing the bills and the order dissolving the injunction are reversed, and the injunction reinstated; and the case is remanded to the circuit court for completion of the pleadings, and a final hearing and disposition on the merits according to the rules and principles governing courts of equity.

Reversed.

NEVADA SIERRA OIL CO. v. HOME OIL CO. ET AL.

(98 Federal 673; Circuit Court, S. D. California. Dec. 18, 1899.)

Receiver to perform annual labor. A court will appoint a receiver to take charge of public lands claimed by both parties under the mining laws of the United States, to the end that the required work may be done thereon for the benefit of the party entitled thereto, where the proof shows that the complainant has reasonable ground for his claim of ownership.

[1]**Surface indications of oil.** To constitute a prior discovery which will support a location of public ground as an oil placer claim under the mining laws, the locator must have actually discovered oil within the limits of the claim. Mere surface indications of the existence of oil therein, however strong, are not sufficient, nor is the existence of oil upon adjoining lands.

[2]**Discovery after location.** In the absence of any intervening rights, the fact that mineral is not discovered on a claim until after the notice of location is posted and the boundary marked is immaterial, and, where the discovery is the result of work subsequently done by the locator, his possessory rights under his location are complete from the date of such discovery.

[3]**Adopting discovery of another.** While it is not necessary that a locator should be the first discoverer of mineral upon the land, in order that a prior discovery by another shall inure to his benefit, and give validity to his location, it must have been known to and adopted and claimed by him.

[4]**Clandestine location.** No right can be initiated on government land which is in the actual possession of another by a forcible, fraudulent, or clandestine entry thereon for the purpose of locating it as a mining or other claim.

On Application for the Appointment of a Receiver.

[1]*Waterloo Co.* v. *Doe*, 17 M. R. 586. *Olive Co.* v. *Olmstead*, 20 M. R. 700. *Bay* v. *Oklahoma Co.* 13 Okl. 425; 73 Pac. 936.

[2]*Beals* v. *Cone*, 20 M. R. 591.

[3]*Hayes* v. *Lavagnino*, 19 M. R. 485. *Willeford* v. *Bell*, (Cal.), 49 Pac. 6.

[4]*Thallman* v. *Thomas*. 111 Fed. 277; 21 M. R. —. *Miller* v. *Chrisman*, 140 Cal. 440; 73 Pac. 1083.

ANDERSON & ANDERSON, J. H. CALL, and WM. J. HUNSAKER, for complainant.

L. L. COREY, J. A. HANNAH, BICKNELL, GIBSON & TRASK, J. S. CHAPMAN, PAGE, MCCUTCHEN & EELLS, and C. C. WRIGHT, for defendants.

Ross, Circuit Judge. The subject of controversy in this suit is a piece of public land of the United States, containing under its surface petroleum, and to which both the complainant and the defendants claim to be entitled under and by virtue of the mining laws. As the defendants are extracting large quantities of oil from the ground, and prevent the complainant from doing the work thereon required by the laws of the United States in order to make good its alleged claim, an application has been made by it to the court for the appointment of a receiver to take possession of the property, and operate it, and do the required work, pending the litigation, for the benefit of the party that may ultimately be adjudged to be entitled to it; the respective parties agreeing that by reason of the operation of wells on adjoining lands no injunction ought, in any event, to be issued, because such action would necessarily result in draining a large part of the oil from the land in controversy by those operating the adjoining territory. Upon the hearing of the application a large amount of testimony was introduced on behalf of the respective parties, consisting in great part of conflicting affidavits. In respect to this conflict of evidence the court would not undertake, at this stage of the case, to make a decisive determination; but if the proof, taken as a whole, shows reasonable ground for the complainant's claim to the land in question, then, clearly, it will be the duty of the court to appoint a receiver to take possession of it pending the litigation, to the end that the annual work required by the laws of the United States may be performed for the benefit of the

party who may ultimately prevail in the suit, and in order to conserve the property for the benefit of the party entitled thereto, and prevent the extraction and disposition, pending the litigation, of the oil, which the proof shows constitutes the chief, if not the only, value of the land. But, unless the proof does show that the complainant's case has a reasonable ground to rest upon, it is the duty of the court to deny the application, for courts of equity do not lightly appoint receivers to take property out of the possession of any party.

The undisputed evidence shows that on the 1st day of January, 1893, the ground in controversy was unappropriated public land of the United States, which had been theretofore surveyed, and by that survey designated as the "northeast quarter of section 20, township 19 south, range 15 east, Mount Diablo base and meridian," containing 160 acres, and that on the day named J. E. Wilson, for himself and seven other persons, all of whom were competent locators, undertook to locate the ground under the mining laws of the United States, posting thereon a notice of location claiming the quarter section as a consolidated mining claim, and, it is contended, marked its boundaries in accordance with the requirements of the law. It is not pretended that Wilson or any of his associates remained in actual possession of the land, or did any work thereon under that location. On the contrary, one of the averments of the bill is that on the 1st day of January, 1896, the land was unappropriated public land of the United States, open to location under the mining laws. The undisputed evidence also shows that in the year 1895 Frank Barrett undertook to locate the same ground, for himself and seven other persons, as a consolidated mining claim, pursuant to the same laws; but neither he nor any of his associates remained in the actual possession of the ground, or did any work under that location. The evidence leaves no room to doubt that on the first day of January, 1896, the land was unappropriated public land of the

United States, on which day, as has been said, Wilson undertook, in behalf of himself and his seven former associates, to make a second location under the mining laws, posting thereon the required notice of location, and, it is contended on the part of the complainant, marking the boundaries in accordance with the requirements of the statute. Assuming that to be so, the difficulty with his location of January 1, 1896, is that the proof fails to show that he made, prior to the posting of the notice and marking of the boundaries, or subsequent thereto under that location, any discovery of mineral in or upon the land. The bill alleges that at the time of the posting of the notice of location of January 1, 1896, Wilson discovered seepages of oil on the land in question, as well as oil sand and shale, but there is no showing in the proof that he discovered any seepages of oil on it. On the contrary I think the evidence shows beyond any doubt that there never were any seepages of oil on that quarter section of land. There is evidence on the part of the complainant going to show that Wilson discovered sandstone and shale thereon, as well as on adjoining lands, and that there were seepages of oil on some of the adjoining lands, as also wells on one of the adjoining tracts, which were producing more or less oil. But these were nothing more than indications of existing oil under the surface of the ground in question, which might or might not prove to be true. Mere indications, however strong, are not, in my opinion, sufficient to answer the requirements of the statute, which requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim. Rev. St. §§2320, 2329; *Mining Co.* v. *Doe* (C. C.) 56 Fed. 685. Indications of the existence of a thing is not the thing itself. It is entirely true that the statute, requiring as a condition to a valid location, the discovery of mineral within the limits of the claim, should, as

between conflicting claimants to mineral lands, receive a broad and liberal construction, and so as to protect bona fide locators who have really made a discovery of mineral, whether it be under the statute providing for the location of vein or lode claims or placer claims. As was well said by Judge Hawley in *Book* v. *Mining Co.* (C. C.) 58 Fed. 106, 120, in speaking of vein and lode claims:

"When the locator finds rock in place containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim."

So, in respect to placer claims, if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery, within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay. The question whether a particular piece of the public land is more valuable for mineral than for agricultural purposes is one that does not arise in cases like the present. While, as has been said, the statute requiring a discovery of mineral as one of the essential conditions of a valid location of land under the mining laws should be liberally construed in behalf of bona fide locators, no court would be justified in ignoring the statutory requirement. Mere indications of mineral, I repeat, do not constitute the discovery of the mineral itself. If so, a location made upon the discovery of such indications, followed by the proper marking of the boundaries of the claim and the doing of the statutory amount of work within the prescribed time, whether the work resulted in the actual discovery of mineral or not, would entitle the locator to apply

for, and upon due proof and payment receive, the government title to the land as mineral land; which obviously would not only be unauthorized by any provision of the statute, but would be in direct conflict with the sections already cited.

What has been said in respect to the absence of any discovery of mineral by Wilson on January 1, 1896, equally applies to his pretended location of January 1, 1893, and to Barrett's pretended location of the same ground in 1895, under whom the defendants claim. Barrett, during the year 1895, undertook to transfer his right to the ground in question, which had no existence in fact or law, to the Producers' & Consumers' Oil Company, which company later undertook to transfer the same thing (which was nothing) to the defendant Miller, and on December 31, 1896, Miller undertook to relinquish to the United States what he did not have, namely, a right to the land in question, and immediately thereafter, to wit, on the 31st day of December, 1896, without having made any discovery of mineral upon the land, undertook to locate the quarter section in question under the mining laws, for himself and seven other persons, by posting the required notice and marking the boundaries. Shortly thereafter he undertook to confer upon Barrett the right to enter upon and explore for and develop oil upon the claim, and to dispose of the oil there found. Barrett thereupon went into actual possession of the land, and early in 1897 erected a derrick thereon, and commenced boring for oil, and shortly thereafter transferred, with the consent of Miller, whatever rights he acquired from him to the defendant Home Oil Company, which company proceeded with the boring, and in October or November, 1897, at a depth of about 800 feet, actually discovered oil in the ground, since which time it has remained in the actual possession of the claim, and bored several other wells, several of which proved to be flowing wells, and in the aggregate yield a large quantity of oil. It would thus seem that, if the location made by

Miller and his associates on the 31st day of December, 1896, was properly marked upon the ground, and the notice of the location properly posted, followed, as it was, by the actual possession of the ground by those claiming under it, and by the actual discovery of mineral within the limits of the claim by them, the requirements of the United States statute in respect to the location of mineral land were answered, no rights of any third party having in the meantime intervened. As said by the circuit court of appeals for the Eighth circuit, in the case of *Erwin* v. *Perego*, 35 C. C. A. 484, 93 Fed. 609, 611:

"The acts of congress prescribe two, and only two, prerequisites to the vesting in a competent locator of the complete possessory title to a lode mining claim. (And the same rule is by the statute made applicable to placer mining claims.) They are the discovery upon unappropriated public land of the United States, within the limits of his claim, of a mineral-bearing lode, and the distinct marking of the boundaries of his claim, so that they can be readily traced. No appropriation of the land is made until both these requirements are fulfilled, and until that time the lode and land sought are open to location and appropriation by any competent locator; but, when these requirements have been complied with, the land is no longer public, but the possession, the right to the possession, and the right to acquire the title are irrevocably vested in the locator."

The court, in the case cited, proceeded to hold that, in the absence of any intervening rights, it is immaterial that the discovery is not made until after the posting of the notice and the marking of the boundaries of the claim, saying that the order in which the statutory requirements are complied with is immaterial so long as the rights of others do not intervene before they are complied with; that "the marking of the boundaries of the claim may precede the discovery, or the discovery may precede the marking; and, if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator as the date of the

later, and a complete possessory title to the premises will vest in him as of the later date,"—citing *Jupiter M. Co.* v. *Bodie Con. M. Co.* (C. C.) 11 Fed. 666; *North Noonday M. Co.* v. *Orient M. Co.* (C. C.) 1 Fed. 522; *Zollars* v. *Evans* (C. C.) 5 Fed. 172; *Strepey* v. *Stark,* 7 Colo. 614, 5 Pac. 111; *Thompson* v. *Spray,* 72 Cal. 528, 14 Pac. 182; *Erhardt* v. *Boaro,* 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113. All of this, however, is based upon the supposition, as is expressly shown in the opinion of the court, that the location has also been made in conformity with any valid state legislation that may exist in the particular state in which the mineral land is situated, and with any valid local rules and regulations of the mining district in which the land may be situated, if any such exist. Section 2324 of the Revised Statutes makes the manner of locating mining claims and recording them subject to the laws of the state or territory, and the regulations of each mining district, when they are not in conflict with the laws of the United States. *Kendall* v. *Mining Co.,* 144 U. S. 658, 12 Sup. Ct. 779, 36 L. Ed. 583. At the time of the actual discovery of oil upon the tract of land here in controversy by the defendant Home Oil Company in the fall of 1897, at which time, if at all, the location under which the defendant's claim became complete, there was in existence an act of the legislature of the state of California entitled "An act prescribing the manner of locating mining claims upon the public domain of the United States, recording notices of location thereof, amending defective locations, and providing for the deposit of district records with county recorders, and prescribing the effect to be given to recordation of notices of location and affidavits," approved March 27, 1897 (St. 1897, p. 214), the first, second, third, and sixth sections of which are as follows:

"Section 1. The location of mining claims upon the public domain of the United States shall be made and perfected as provided in this act.

"Sec. 2. The discoverer of any vein or lode shall immediately upon making a discovery, erect at the point of discovery a substantial monument or mound of rocks, and post thereon a preliminary notice, which shall contain: First—the name of the lode or claim; second—the name of the locator or locators; third—the date of the discovery; fourth—the number of linear feet claimed in length along the course of the vein each way from the point of discovery; fifth—the width claimed on each side of the center of the vein; sixth—the general course of the vein or lode, as near as may be; seventh—that such notice is a first or preliminary notice. Such notice shall be recorded in the office of the county recorder of the county in which the same is posted within twenty days after the posting thereof. Upon the erection of said monument and posting such notice, the discoverer shall be allowed the period of time specified in section three of this act to enable him to perfect his location as hereinafter provided.

"Sec. 3. Within sixty days from the date of the discovery of a vein or lode, the discoverer must perform fifty dolars worth of labor in developing his discovery, and distinctly mark his location on the ground so that its boundaries can be readily traced, and must file in the office of the county recorder of the county in which the claim is situated, a certificate of location, which said certificate shall state: (1) The name of the lode or claim. (2) The name of the locator or locators. (3) The date of discovery and posting of the notice provided for in section two of this act, which shall be considered as the date of the location. (4) A description of the claim, defining the exterior boundaries as they are marked upon the ground, and such additional description by reference to some natural objects, or permanent monuments, as will identify the claim. (5) A statement that such certificate is the final or completed notice of location, and that he has performed the aforesaid fifty dollars worth of labor in development work thereof within the aforesaid sixty-day period, stating generally the nature thereof. Said certificate shall be dated and signed by or on behalf of the locator or locators, and verified by them or by some one in their behalf, and when filed for record shall be deemed and considered as prima facie evidence of the facts therein recited. A copy of such certificate of location, certified by the county recorder, shall be admitted in evidence in all actions or proceedings with the same effect as the original. The performance of such labor shall be deemed a necessary act in completing such location and a part thereof, and no part thereof shall inure to the benefit of any subsequent location."

"Sec. 6. All locations of quartz or placer formations or deposits, hereafter made, which do not conform to the requirements of this act, in so far as the same are respectively applicable thereto, shall be void."

In the view I take of the present case, it is not necessary to decide to what extent, if at all, this act, while in force, was applicable to placer claims, or whether, in view of this state legislation, the location under which the defendants assert title is or is not invalid. Assuming that the defendants failed to comply with the provisions of this state legislation, and that such failure operated to open the land to the location of any other competent locator, the fact remains that the defendants continued in the actual possession of the land, and continued to mine the same for oil, and that they were so in possession and so engaged on the 26th day of May, 1898, when Frank H. Jackson, for himself and the seven other persons who had theretofore been associated with Wilson, undertook to locate the ground in question under the mining laws. That location, according to the affidavit of Jackson, which was introduced in evidence on behalf of the complainant, was based upon these facts, as constituting his discovery, and nothing else:

"That on May 26, 1898, he (Jackson) was on said northeast quarter of said section. That on said date he discovered indications of oil-bearing strata on said quarter section at and near the southeast corner thereof. Said indications were as follows: At the said southeast corner the surface is covered with broken-up formations of sandstone, and underneath, less than one foot beneath the surface, affiant found the sandstone in place. A few feet east and northerly from said corner a ravine cuts the formation, showing the solid sandstone stratum in place, being the same stratum that underlies the said corner a short distance above said corner in said ravine, and about on the west line of section 20. There is a highly mineralized spring, charged with soda and other salts, such as are almost invariably found in the proximity of oil-bearing sand, and which indicate the oil sand is in the immediate neighborhood. The sandstone referred to has some strata or shale, and said sandstone and shale are of the character that usually carry oil in said district, and said shale bears indications of bituminous matter. That on said date he located the said northeast quarter section as a placer mining and oil claim as follows,"—giving the boundaries.

The previous observations upon the subject of discovery dispose of this attempted location by Jackson for himself and his seven associates. It was, as he himself testified, based merely and solely upon surface indications of oil, which are insufficient to constitute a discovery. It is doubtless true as will appear from what follows, that Jackson, at the time of the making of his attempted location on May 26, 1898, knew of the actual discovery by the defendants of oil upon the land in question; but it is perfectly plain, from his own affidavit, that he did not base his location upon any such knowledge. It is also true, as a matter of law, that it is not necessary that a locator should be the first discoverer of mineral upon the land in order to make a valid location; but he must not only have knowledge of the former discovery, but such actual discovery must be adopted and claimed by him in order to give validity to his location. *Jupiter M. Co.* v. *Bodie Con. M. Co.* (C. C.) 11 Fed. 666, 676. This, as has been shown, Jackson did not do, but, on the contrary, based his location upon mere surface indications of the existence of oil, which, as has been said, is insufficient to constitute a discovery. Moreover, I think it clear that the attempted location by Jackson, made on the 26 day of May, 1898, was invalid for another reason. The defendants were at that time in the actual possession of the claim in controversy, and actually engaged in mining it for oil. It appears from the affidavit of C. A. Canfield, one of the parties interested in the defendant Home Oil Company,—and this I do not find anywhere contradicted:

"That in the month of May, 1898, J. E. Wilson [who, Jackson swears in his affidavit, assisted him in marking the boundaries under the location made by him May 26, 1898] and Frank H. Jackson came to Oil City, and at affiant's invitation stayed at his cabin, and where they were entertained as guests. That the morning after they came to affiant's cabin, as aforesaid, affiant saw them engaged in the erection of a monument. He went to them, and asked them

what they were doing, whereupon said Jackson told him that they were perpetuating the monuments defining the line of section 17 in said township and range. That affiant thereupon showed them where the south center corners of said section 17 were, whereupon they moved the rock over to the corner so indicated. That after the said Wilson and Jackson left the said monument, the said affiant went and got I. F. Postom, who was then manager of the Home Oil Company, operating on the northeast corner of section 20, and he and said Postom tore down said monument, to make an examination thereof, and to see if they had left any notice of claim of any kind whatever therein, and they found nothing therein, and they thereupon restored said monument. That some time in June, 1897, some person, to affiant unknown, entered upon the said northeast quarter of section 20, went to the southwest corner thereof, and partially erected a derrick. That, as soon as said affiant discovered that the derrick was there, he went down, and made an examination of it, and found nobody around or in possession of that portion of said quarter section in connection with said derrick. That affiant says, after his first visit there, later in the same day, the same or other parties placed or added more to the structure of the said derrick, but without completing it. That thereafter no further work was done by anybody in connection with said derrick, nobody remaining in possession of or claiming it, or to the ground in connection therewith, and the next time that the affiant visited that portion of the ground, which was a few weeks later, he found said derrick was down."

There are affidavits on behalf of the complainant to the effect that the derrick thus spoken of was built by Wilson, and that he completed it at a cost of $100, and that it was so built under and pursuant to the location made by Jackson on May 26, 1898. It is true that upon mineral land of the United States upon which there is no valid existing location any competent locator may enter, even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself; but no right upon any government land, whether mineral or agricultural, which is in the actual possession of another, can be initiated by a forcible, fraudulent, surreptitious, or clandestine entry thereon. Such entry must be open and aboveboard, and made in good faith. *Belk* v. *Meagher,* 104

U. S. 279, 26 L. Ed. 735; *Atherton* v. *Fowler,* 96 U. S. 513 24 L. Ed. 732. One who is in the actual possession of a mining claim, working it for the mineral it contains, and claiming it under the laws of the United States, whether the location under which he so claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely, or otherwise fraudulently intruded upon or ousted while he is asleep in his cabin, or temporarily absent from his claim. I think it clear from the showing made upon the hearing of this application: First, that Jackson did not make any such open and good-faith entry upon the actual possession of the defendants of the quarter section in question, upon which he could initiate any valid location thereof under the mining laws; and secondly, that according to his own affidavit, he made no such discovery of mineral upon the land as the statute requires. For the reasons stated, I am of the opinion that the complainant is not entitled to the appointment of a receiver herein, irrespective of the question of the validity of the location under which the defendants assert title, and irrespective of other questions argued by counsel. An order will be entered denying the application for the appointment of a receiver.

JAMES A. MURRAY ET AL. v. JANE POLGLASE ET AL.

(Adams et al. Intervenors.)

(23 Montana 401; 59 Pac. 439. Supreme Court. Dec. 18, 1899.)

A third party who has not filed an adverse claim cannot intervene in the suit supporting an adverse claim brought by another although he asserts a title hostile to both parties.

[1]**The action supporting an adverse claim may be ejectment** or a suit to quiet title according to the position of the parties at the time.

The action is part of a statutory procedure and only one who has filed the adverse claim and who can allege that he filed it within the 60 days and brings his suit within the 30 days can appear as a suitor to defeat the alleged title of the applicant for patent.

[2]**Where the receiver's receipt has been obtained by fraud** the fact of entry does not relieve from the necessity of doing annual labor.

Effect of cancellation of receiver's receipt. Where a receiver's receipt, showing that the entryman of a mining claim is entitled to the patent, is subsequently annulled for fraud practiced in obtaining it, and the entryman has failed to do the annual representation work, the claim is subject to relocation.

Idem. Where a receiver's receipt, under which plaintiff is seeking to establish an adverse claim to a mining location, is shown to have been cancelled, evidence of defendant's adverse location and publication of notice are admissible in evidence.

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[1]*Young* v. *Goldsteen*, 97 Fed. 303. *Preston* v. *Hunter*, 67 Fed. 996. *Book* v. *Justice Co.*, 58 Fed. 827. *Perego* v. *Dodge*, 18 M. R. 364.

The suit may be at law or in equity. Complaint sufficient without details of location. *Tonopah Co.* v. *Douglass*, 123 Fed. 936.

[2]A receiver's receipt obtained pending the adverse is void and the suit proceeds on the possessory title. *McEvoy* v. *Hyman*, 15 M. R. 300. *Deeney* v. *Mineral Co.*, — N. Mex. —; 22 M. R. —.

Plaintiff failing to prove title has no standing to attack defendant's showing of title. *Connolly* v. *Hughes*, 18 Colo. App. 372; 71 Pac. 681.

A defendant in a suit supporting adverse claim has no right to jury trial. *Montana Co.* v. *Boston Co.* 27 Mont. 288; 70 Pac. 1114. *Contra, Manning* v. *Strehlow*, 11 Colo. 456; 18 Pac. 625.

Suit supporting should not be dismissed for non-joinder as plaintiff

Appeal from District Court, Silver Bow County; William Clancy, Judge.

Action by James A. Murray and others against Jane Polglase and others to establish an adverse claim to a mine location, in which W. W. Adams and others intervened. Judgment was rendered for interveners, from which defendants appeal; and plaintiffs appeal from the judgment and an order denying a new trial. Reversed.

of one who buys in after suit commenced. *Mackay* v. *Fox*, 121 Fed. 487.

The adverse claimants applied for and received, patent for that part of the lode not in dispute: *Held*, no waiver of their adverse claim to the balance. *Id.*

A plaintiff who proves only a location, but not a valid record, and who does not prove actual possession is not entitled to a verdict in an adverse claim suit. *Hahn* v. *James*, — Mont. —; 73 Pac. 965.

An adverse claim suit is a special proceeding having its initiation in the land office and state statutes regulating ejectment cases have no application. *Lily M. Co.* v. *Kellogg*, — Utah —; 74 Pac. 518.

A plaintiff in such suit cannot amend his complaint so as to recover ground not included in his adverse claim. *Id.*

The proceedings in the land office are not material, except so far as they aid the court to determine the right to possession. *Gruell* v. *Rocco*, 141 Cal. 417; 74 Pac. 1028.

Failure to file adverse is as fatal as if adverse had been filed and determined against the adverse claimant. *Jefferson Co.* v. *Anchoria Co.*, — Colo. —; 75 Pac. 1070.

Material allegations of complaint supporting, considered. Though required to be brought within thirty days, it may be afterwards amended. *Woody* v. *Hinds*, — Mont. —; 76 Pac. 1.

The proceeding to support by suit is regulated by state practice. Where the plaintiff is in possession the action is one to quiet title and a jury verdict is not essential. *Mares* v. *Dillon*, — Mont. —; 75 Pac. 963.

The judgment should be confined to the area in conflict. *Mares* v. *Dillon*, — Mont. —; 75 Pac. 969.

The land office fee and surveyor's charges are not taxable as costs. *Id.*

STATEMENT OF THE CASE.

On September 17, 1892, the defendants filed their application in the United States land office for a patent to the Ramsdell lode-mining claim. After notice was published, and within the time prescribed by law, the plaintiffs, Murray et al., filed their adverse claim in the land office, and began this suit. The plaintiffs base their claim upon a prior location, described as the "Maud S. Lode-Mining Claim," alleging ownership and right of possession, and ouster by defendants. The defendants join issue upon these averments, and then set up affirmatively that they were in possession of the ground in controversy long before plaintiffs made any claim thereto, and that, if plaintiffs ever made a location thereon, they had forfeited all right thereto by failure to do the annual representation work for the years 1887 and 1888. Plaintiffs, in their replication, admit that they did no representation work upon the Maud S. claim for the years 1887 and 1888, but allege that they made a final entry of the land embraced therein in the land office on December 29, 1887, and obtained a receiver's receipt therefor showing that they were entitled to a patent. The defendants' location was made on January 1, 1888. The location of the Maud S. claim was made by one of the plaintiffs and others on May 28, 1881. Both claims cover the same ground. A trial of the cause was had in the district court, and resulted in a judgment in favor of plaintiffs. Upon appeal to this court the judgment was reversed, and a new trial ordered (17 Mont. 455, 43 Pac. 505), for error by the trial court in excluding from the evidence decisions of the local land office, the commissioner of the land office at Washington, and the secretary of the interior, offered by the defendants, canceling and setting aside the receiver's receipt held by plaintiffs. The final decision of the secretary of the interior was rendered June 1, 1892. Before the sec-

ond trial was had in the district court, Walter W. Adams, Henry Muntzer, William Burton, Eduard Wegner, and Charles Colbert made an application to the court for leave to intervene in the cause; claiming the ground in controversy, as against both plaintiffs and defendants, under a location of the same made by themselves on January 31, 1894, as the "Adverse Lode-Mining Claim." They allege in their complaint in intervention that the plaintiffs had lost whatever right they acquired under the Maud S. location by failure on their part to do any representation work on the claim for the years from 1888 to 1893, inclusive, or to resume work thereon before January 31, 1894, the date of completion of the Adverse location. They also allege failure on the part of the plaintiffs to claim their rights by filing affidavit of claim under act of congress approved November 3, 1893. As against defendants, they allege that the receiver's receipt outstanding in the hands of plaintiffs on January 1, 1888, had withdrawn the land from the public domain; that it was not open to exploration and location by any one at that time; and that therefore defendants acquired no right to it by virtue of the Ramsdell location. Judgment is demanded that they be declared the owners and entitled to the possession of the ground as against both plaintiffs and defendants. The complaint was allowed to be filed over the objection of the plaintiffs and defendants, who preserved their exceptions.

At the trial the plaintiffs introduced in evidence the facts of their location, their location notice, and the receiver's receipt, and thereupon rested. The defendants introduced the records of the Unitd States land office, showing the cancellation of this receipt, and then offered proof of their location, and notice recorded in pursuance thereof. Upon objection of all the other parties, this evidence was excluded, and thereafter the defendants took no further part in the trial than to enter their objections and preserve their exceptions.

Plaintiffs and interveners concluded their proofs, and the jury rendered a verdict for the interveners. Judgment was accordingly entered in their favor under the prayer of their complaint. Plaintiffs moved for a new trial, which was denied. Defendants have appealed from the judgment. Plaintiffs have appealed from the judgment and the order denying a new trial. The appeals were filed under separate numbers, but were heard and are decided together.

GEO. HALDORN, JOHN W. COTTER, for plaintiffs and appellants.

FORBIS & FORBIS, and F. T. MCBRIDE, for defendants and appellants.

W. I. LIPPINCOTT and WM. H. DE WITT, for intervenors and respondents.

BRANTLY, C. J. After stating the case, delivered the opinion of the Court.

The records of the United States land department, introduced by defendants, show that the entry of the ground in controversy by the plaintiffs on December 29, 1887, was cancelled for fraud, upon the protest of some of the defendants and the predecessors of the others. The fraud alleged and established was that plaintiffs had represented to the register and receiver that they had done sufficient work upon the claim to entitle them to a patent, whereas they had not done more than one-half that amount. From these facts and the foregoing statement, it will be seen that the parties, respectively, occupy these positions: The plaintiffs contend that, by their entry and the receipt issued to them, the land was withdrawn from the public domain, so that the defendants could acquire no rights by their location on January 1, 1888, notwithstanding no work was done by

plaintiffs for the previous year, and the entry was subsequently canceled for fraud. This withdrawal, they say, was effective to protect them against a location by any one else until the receipt was finally canceled on June 1, 1892, and that when this occurred they could resume work, and thus retain their original right. The defendants insist that, as the entry was void, because fraudulently made, the plaintiffs were not, even during the existence of the receipt, excused from doing the necessary work to prevent a forfeiture, and that a cancellation of the entry inured to their benefit, so as to give them a valid claim to the ground under their location. The interveners support the contention of the plaintiffs against the claim of the defendants, but maintain that their claim is good as against plaintiffs, because of a forfeiture incurred by plaintiffs in 1893. The trial court sustained the contention of the plaintiffs as against defendants, thus excluding defendants from the case, leaving only the question of the forfeiture of 1893 to be tried between the plaintiffs and the interveners. Both plaintiffs and defendants contend that the interveners have no rights in this case. These contentions require the solution of two questions: (1) Did the court err in permitting the intervention? (2) Assuming the defendants' location to be otherwise valid, did they acquire any right thereunder by virtue of the cancellation of plaintiffs' entry?

1. We are of the opinion that the trial court erred in permitting the intervention. Actions of this kind are brought under section 2326 of the Revised Statutes of the United States, and the act of congress of March 3, 1881, amendatory thereof. The form of the action and the mode of procedure are regulated by the same rules and controlled by the same statutes that apply to ordinary actions in the state courts. *Wolverton* v. *Nichols,* 5 Mont. 89, 2 Pac. 308; *Milligan* v. *Savery,* 6 Mont. 130, 9 Pac. 894; *420 M. Co.* v. *Bullion M. Co.,* 9 Nev. 240. But the ultimate question to be determined

is, which of the parties is entitled to a patent? The action may be in ejectment, or a suit to quiet title, according to the position of the parties at the time suit is brought; but the ultimate purpose of the suit must be kept constantly in view, so that the judgment may be so framed as to accomplish that purpose. *Wolverton* v. *Nichols, supra,* was reviewed by the supreme court of the United States. 119 U. S. 485, 7 Sup. Ct. 289, 30 L. Ed. 474. That court, conceding the right to the territorial court to try the case under the statutes of the territory applicable to the form of action therein adopted, reversed the judgment of the trial court on the ground that it misinterpreted the facts proved by the plaintiffs in support of their case. In speaking of the purpose of the action, however, the court said: "The proceedings in this case commenced by the assertion of the defendants' claim to have a patent issue to them for the land in controversy. The next step was the filing of an adverse claim by the plaintiffs in the land office, and the present suit is but a continuation of those proceedings, prescribed by the laws of the United States, to have a determination of the question as to which of the contesting parties is entitled to the patent. The act of congress requires that the certified copy of the judgment of the court shall be filed in the land office, and shall be there conclusive. And we must keep this main purpose of the action in view in any decision made with regard to the rights of the parties." In *Garfield M. Co.* v. *Hammer*, 6 Mont. 53, 8 Pac. 153, Mr. Justice Galbraith, for the court, said: "Now, although the courts of this territory, in determining the title to mining claims where there is a dispute in relation thereto in the land office, have adopted the forms of action by which title to land is tried, which may be either by the action of ejectment or to quiet title, yet the real question to be determined is, who is entitled to the patent from the United States government to the mining claim in controversy, or, in other

words, who has become the purchaser of the mining claim, and divested the title of the government thereto, by complying with the requirements of the law of congress relative to acquiring title to mineral lands?" Again, this court, in *Hoffman* v. *Beecher,* 12 Mont. 489, 31 Pac. 92, after quoting the foregoing language with approval, said: "An analysis of the issues in the case at bar demonstrates the purposes for which the parties are engaged in this litigation, and that the adverse claim is the foundation of the action, and that appropriate relief will be granted upon the ultimate facts." In keeping with this view of the ultimate purpose to be accomplished, it has grown to be the inveterate practice in this jurisdiction to require the pleadings in such cases to contain allegations showing that the court has jurisdiction to proceed with the case, and so enabling it intelligently to reach a determination of the question at issue. Accordingly, in *Mattingly* v. *Lewisohn,* 8 Mont. 259, 19 Pac. 310, it was held by this court that a complaint in an action to establish an adverse claim for a patent was fatally defective, in that it failed to allege that plaintiff had filed his adverse claim in the land office within the 60 days allowed by section 2326, *supra,* and that the suit was brought within 30 days thereafter. The allegations were held to be necessary, because the plaintiff must prove these facts in order to have any standing in court. If he must prove them, he must necessarily allege them. Doubtless, if the complaint contained allegations sufficient in other respects, the court would judicially know whether the suit were brought within 30 days after the filing of the adverse claim; but, in any event, the fact must appear from the face of the record. And this is not an unreasonable or unnecessary requirement, because its observance prevents conflict of action between the state court and the officers of the land department, and enables the court to know whether its judgment thus sought, often through tedious and expensive legislation, will, in the end, be effective for any pur-

pose; for, if the suit is not instituted within the statutory time, the officers of the land department cannot give the judgment any effect whatever, even if it be against the applicant for patent. The rule of *Mattingly* v. *Lewisohn* has been uniformly observed in this state, as an examination of the original records in *Wulf* v. *Manuel,* 9 Mont. 279, 23 Pac. 723, *Hoffman* v. *Beecher, supra,* and other cases will show. In *McKay* v. *McDougal,* 19 Mont. 488, 48 Pac. 988, it was expressly approved. The rule also finds expression in section 1322 of the Code of Civil Procedure of 1895; for it is there provided that "it is sufficient to confer jurisdiction upon the court, if it appears from the pleadings that the application for a patent has been made, and an adverse claim thereto filed and allowed in the proper land office." Whether the form of action is changed in other respects by this provision or not, it seems clear that the provision itself is, in the particular here considered, a statutory declaration of the rule always observed by this court.

If it is necessary that these allegations be made in the pleadings, then no one who cannot make them (that is, no one who has not filed his adverse claim under the statute) has any right to maintain a suit against the applicant, and thus delay the issuance of the patent. It is only by virtue of their compliance with the law in this particular that the plaintiffs have obtained standing in court; but that they did so, and had thus delayed the issuance of patent until long after the time for filing adverse claims has expired, is no reason why the interveners should be permitted to interfere and litigate their claims with the parties.

Counsel for the interveners cite section 589 of the Code of Civil Procedure, which provides, "Any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both." They also cite a part of section 430 of Mr. Pomeroy's Remedies, constru-

ing the foregoing provisions, viz.: "The intervener's interest must be such that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought, or, if the action had first been brought against him as the defendant, he would have been able to defeat the recovery in part at least." They insist that they have an interest adverse to both parties herein, and that under this provision of the statute, as interpreted by Mr. Pomeroy, they should be allowed to litigate their rights in this case. But, under the rule of pleading heretofore seen to be applicable to suits of this character, they do not and cannot make the allegations or the proof necessary to give them any standing in court whatever. If they have any right to the ground in controversy, they cannot enforce it through the medium of an intervention in this action, but must be relegated to the land office, where they may be permitted to show that the parties who may succeed herein have not complied with the law. Lindl. Mines, § 758; *Mt. Blanc M. Co.* v. *Debour,* 61 Cal. 364. The principle of the case last cited we think the correct one, notwithstanding an intimation to the contrary in *Altoona Quicksilver M. Co.* v. *Integral Quicksilver M. Co.,* 114 Cal. 100, 45 Pac. 1047. Counsel also cite *Enterprise M. Co.* v. *Rico-Aspen Con. M. Co.,* 167 U. S. 108, 17 Sup. Ct. 762, 42 L. Ed. 96, as conclusive upon the point that the filing of an adverse claim was not necessary to give them the right of intervention. The case is not in point. It involved a controversy between the patentee of a mining claim and the owner of a tunnel site as to the ownership of veins intersecting the line of the tunnel. The mining claim was the junior location, and was parallel with the course of the tunnel. At the time the patent for the mining claim was applied for, it was not apparent that it covered any lead that would be cut by the tunnel. No adverse claim was made by the tunnel site owner.

Subsequently it developed that the claim interfered with the tunnel site owner's rights. Under these circumstances, it was held that the tunnel site owner lost no rights by failing to file an adverse claim, because the conflict was not then known, and that his rights were superior to the rights under the junior claim.

2. The answer to the second question will be reached when we have determined what obligation, if any, rested upon plaintiffs to do the representation work during the year 1887. Were they relieved from the necessity of doing it by the receipt obtained by fraudulent representations to the authorities of the land office? The contention of the plaintiffs is that they were. They proceed upon the assumption that after the officers of the land department have examined into the application for a patent, have determined that the applicant is entitled to purchase, have accepted his money in payment for the land and issued to him a certificate of purchase, he is vested with the full equitable title thereto. The land is then withdrawn from the mass of the public lands, and, no matter what infirmity may inhere in the proceedings by which he obtained his certificate, no one else can acquire any right to the land, as against him, so long as he holds the certificate. A fraudulent certificate, they say, is just as effective to preserve their rights as an honest one.

There is no doubt that when the entryman has complied with the law in good faith, and has been recognized by the government as a purchaser, he is regarded, as to third persons and the government, as the equitable owner of the land. As such, he is liable to pay taxes on it, the same as upon his other property. *Carroll* v. *Safford,* 3 How. 441, 11 L. Ed. 671; *Witherspoon* v. *Duncan,* 4 Wall. 210, 18 L. Ed. 839. He is to be treated as the owner. In *Witherspoon* v. *Duncan,* after asserting the power of congress to dispose of the public land either by sale or donation, the court proceeds: "In either case, when the entry is made and the certificate given, the

particular land is segregated from the mass of the public lands, and becomes private property. In the one case the entry is complete when the money is paid; in the other, when the required proof is furnished. In neither case can the patent be withheld, if the original entry was lawful." The effect of an entry of public land has also often been considered in the construction of grants by the United States in aid of railroads, where the grant contains a reservation or exception in favor of homestead, pre-emption, or other claims which had attached before the definite location of the line or route of the road. It has always been held by the federal courts, except as hereafter noted, that, as the grant becomes effective only upon the definite location of the line of the road, all claims which have attached to lands within the limits of the grant prior to that time, whether valid or not, come within the exception, and are reserved from the operation of the grant. *Hastings & Dakota R. Co.* v. *Whitney,* 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363; *Kansas Pacific R. Co.* v. *Dunmeyer,* 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1112; *Whitney* v. *Taylor,* 158 U. S. 85, 15 Sup. Ct. 796, 39 L. Ed. 906; *N. P. Railroad Co.* v. *Sanders,* 166 U. S. 620, 17 Sup. Ct. 671, 41 L. Ed. 1139; *So. Pac. Railroad Co.* v. *Brown,* 21 C. C. A. 236, 75 Fed. 85. The later case of *N. P. Railroad Co.* v. *De Lacey,* 174 U. S. 622, 19 Sup. Ct. 791, 43 L. Ed. 1111, however, modifies the rule of the earlier cases cited, so that the exception is held not to apply to pre-emption claims where the claimant has failed to make final proof and payment within the time provided by law. Such claims, though of record in the land office, are held to have been forfeited by operation of law. As to other classes of claims the rule appears to remain unchanged. Counsel for plaintiffs cite these cases, and *Carroll* v. *Safford* and *Witherspoon* v. *Duncan, supra,* as conclusive of their contention. We do not think they are. The cases of *Carroll* v. *Safford* and *Witherspoon* v. *Duncan* proceed upon the obvious prin-

ciple that one who has purchased lands in good faith from the government, and holds the evidence of his purchase, is, as to the government and third persons, the equitable owner of them, and that he cannot avoid his duty to the state simply because he has not been vested with the legal title. The rule would be the same, however, if his title were fraudulent. So long as he stands as the apparent owner claiming the land, the obligation is the same. But his duty to the state under such circumstances, would not prevent the government, or perhaps a person standing in its place, from avoiding his claim by showing it to be fraudulent and unfounded. The plaintiffs in this case were doubtless liable to pay taxes upon the Maud S. claim so long as they remained the apparent owners of it, though it be conceded that they had no title whatever. In our opinion, there is also a clear distinction to be drawn between the relative positions and rights of the parties in this case, and those of the parties in controversy arising out of the construction of railroad grants. A grant of this kind is a specific grant in *præsenti,* vesting and becoming certain upon the definite location of the line of the road. When the line becomes fixed, the corporation is vested with title to all the designated lands within its limits, other than those expressly excepted or reserved. These exceptions are specifically mentioned, including, among others enumerated, those to which "the right of pre-emption or homestead settlement has attached," or those not "free from pre-emption or other claims or rights," and are held to be excluded from the operation of the grant by the very fact of their existence at the time the grant attaches, without regard to whether they are fraudulent or otherwise, unless forfeited by operation of law. *Northern Pac. R. Co.* v. *Majors,* 5 Mont. 111, 2 Pac. 322; *Northern Pac. R. Co.* v. *Lilly,* 6 Mont. 65, 9 Pac. 116; *U. S.* v. *Northern Pac. R. Co.,* 6 Mont. 351, 12 Pac. 679; and also cases in last citation. It was not contemplated by congress at the time the grant was made that,

in every instance where a claim had attached to land within the limits of the grant, the settler or other claimant should be put to the trouble or expense of showing his good faith or the validity of his claim, as against the railroad company. *Kansas Pacific R. Co.* v. *Dunmeyer,* and *Hastings & Dakota R. Co.* v. *Whitney, supra.* These questions were left to be adjusted between the government and the claimants. The claims came within the exceptions expressly enumerated, and were therefore excluded from the operation of the grant. On the other hand, the parties plaintiff and defendant in this case stand as two rival purchasers, each claiming to be entitled to the land in question. The latter have confessedly acted in good faith in the performance of the required conditions, while the former, though admitting their fraud, nevertheless insist that, because they thereby induced the government to make them the apparent purchasers, they are excused from the performance of those conditions. Though they were detected in their fraud, and the government declared them without title, this fact, they say, did not affect their right to claim the land under the receipt while they held it, and thus to exclude others from acquiring any right thereto.

It is conceded on both sides that when a locator, having complied with the law, in good faith completes his proof and pays the purchase money, his equitable title is complete. The conditions are then all performed, and no further obligation rests upon the applicant to expend money in doing the annual representation work. Even if the patent is delayed for any reason, still when it is finally issued it is evidence of the regularity of all previous acts, and relates back to the date of the original entry, so as to cut off intervening rights. Indeed, the decisions are uniform on this question wherever it has been considered. *Deno* v. *Griffin,* 20 Nev. 249, 20 Pac. 308; *Aurora Hill Con. M. Co.* v. *85 M. Co.,* (C. C.) 34 Fed. 515; *Benson M. & S. Co.* v. *Alta M. & S. Co.,* 145 U. S.

428, 12 Sup. Ct. 877, 37 L. Ed. 762; Barringer & A. Mines & Min. 265; *In re Harrison,* 2 Land Dec. Dep. Int. 767. But we have not been able to find any adjudicated case upon the exact question presented here. Counsel have cited none, and we therefore conclude that there is none. This fact, however, is to be noted: That in all the cases cited, except those arising out of railroad grants, the presumption has obtained that the entry in question was made in good faith, and in each one of them the entry was a subsisting one at the time the controversy arose. Counsel for defendants have cited *U. S.* v. *Steenerson,* 1 C. C. A. 552, 50 Fed. 504. In that case one Hanson had made a pre-emption entry upon public land, and on November 1, 1884, made his final proof, and received a certificate of purchase. He at once conveyed the land to Steenerson, one of the defendants. During the winter of 1885-86 the firm with which Steenerson was associated cut from the land 754,000 feet of logs, and had them in their possession. In April, 1886, the United States brought suit in replevin to recover the logs, claiming that the title to the land, and therefore to the timber, had not vested under the entry, on account of fraud practiced by Hanson in making it. During the pendency of the suit, and before the trial, the entry was canceled by the commissioner of the land office on the ground that the entry was not made in good faith for actual settlement, but for the purpose of enabling Steenerson and his associates to strip the land of the timber thereon. The circuit court of appeals sustained the action. We quote from the opinion by Judge Shiras: "The final certificate or receipt acknowledging payment in full, and signed by the officers of the local land office, is not in terms, nor in legal effect, a conveyance of the land. It is merely evidence on behalf of the party to whom it is issued. In a contest involving the title to land, wherein a person claims adversely to the United States, it is open to such claimant, notwithstanding the legal title remains in the United States,

to prove that, by performance on his part of the requisite acts, he has become the equitable owner of the land, and that the United States holds the legal title in trust for him; but as the claimant in such case has not received a patent or formal conveyance, and has not become possessed of the legal title, he is required to show performance, on his part, of the acts which, when done, entitle him, under the law, to demand a patent of the land. When evidence of this kind is offered on behalf of the claimant, it is open to the United States to meet it by proof of any fact or facts which, if established, will show that the claimant has not become the real owner of the realty. If it be true, in a given case, that the entry of the land was not made in good faith, but in fraud of the law, certainly it cannot be said that the claimant has become the equitable owner of the land, and that the United States is merely a trustee holding the legal title for his benefit. Fraud vitiates any transaction based thereon, and will destroy any asserted title to property, no matter in what form the evidence of such title may exist." The case is not in point upon the question here considered, but it is suggestive, in that the court emphasizes the necessity resting upon the entryman to perform in good faith all the conditions required by law before he makes the entry. These are conditions precedent, and without the performance of them in good faith no title vests. The cancellation of plaintiffs' receipt adjudicated the fact that they obtained no title at all by their entry. By this judgment of the authorities of the land office they were deprived of the ability to claim any rights under it. They were left with just such rights as they had at the time they obtained it. If they chose to rely upon it as evidence of their title, and then forbore to preserve their rights by doing the acts necessary to preserve them, they are not now in a position to assert that they have lost nothing. They stand in the same position as they would have stood on January 1, 1888, if they had not obtained the receipt at all. They cannot be

heard to say that during the time the receipt was outstanding the land was withdrawn from the mass of public lands, and that defendants acquired no rights under their location. Plaintiffs' rights were forfeited, and the Maud S. claim was subject to relocation, at the time the Ramsdell claim was located. To hold otherwise would be to lend assistance to the fraud attempted by the plaintiffs, and which would have been successful but for its exposure made by defendants and their predecessors. It would permit them to profit by their own misconduct, in violation of the principle expressed in the wholesome maxim, "*Nemo allegans suam turpitudinem est audiendus.*" We are not to be understood as holding that the plaintiffs have no rights in any event. We speak upon the facts in the record before us.

The trial court refused to permit the defendants to introduce the notice of location, and the facts upon which it was based, on the ground that there had been no forfeiture of the Maud S. claim. This was error. If upon another trial, however, it should appear that the acts done by the defendants on January 1, 1888, did not amount to a valid location, they would be in no position to take advantage of plaintiffs' forfeiture, and plaintiffs would be entitled to a judgment against them.

Nor are we to be undertsoood as dissenting from the rule of the cases cited in the former part of this opinion, touching the force and effect of a certificate of purchase from the United States. The language used in those cases is very broad and sweeping, but is applicable only to the facts of those particular cases. Such a receipt is not open to collateral attack in the courts in controversies arising between rival claimants to land covered by them. This case is an exceptional one, and is decided upon its own peculiar facts, under the principles applicable to them.

While we feel satisfied to rest our decision upon the reasons already given, there is another question involved which

requires a brief notice. The opinion rendered on the former appeal in this case concludes thus: "We are therefore of opinion that the certified copies of the register and receiver, the commissioner of the general land office, and the secretary of the interior should have been admitted in evidence. It was error to exclude them, either for the reasons expressed by the court, or those argued by counsel. These documents were material to defendants' case. Plaintiffs had proved a receiver's receipt for the land in controversy. If this were unattacked, it concluded the defendants. To avoid this result, it was material to defendants to show that this receiver's receipt did not exist, and that it, with its force and power, had been destroyed by the cancellation of the same by the officers of the land department having jurisdiction over that subject." This conclusion states the decision of this court of the only question determined. The sole purpose for which the evidence is competent is to establish the fact that plaintiffs forfeited their rights on January 1, 1888. It thus opens the way for defendants to introduce the proof of their location. That decision was therefore a determination, indirectly, that the Maud S. claim was forfeited by the failure of plaintiffs to represent their claim in 1887. It is therefore the law of this case, and binding on us. *Daniels* v. *Insurance Co.*, 2 Mont. 500; *Palmer* v. *Murray*, 8 Mont. 174, 19 Pac. 553; *Kelly* v. *Cable Co.*, 8 Mont. 440, 20 Pac. 669; *Davenport* v. *Kleinschmidt*, 8 Mont. 467; *Maddox* v. *Teague*, 18 Mont. 512, 46 Pac. 535; *Priest* v. *Eide*, 19 Mont. 53, 47 Pac. 206, 958.

The judgment herein in favor of the interveners against the plaintiffs and defendants, and the order denying plaintiffs' motion for a new trial, are reversed, and the cause is remanded, with directions to the district court to grant a new trial.

Reversed and remanded.

J. J. JOHNSON v. CALIFORNIA LUSTRAL CO.

(127 California 283; 59 Pac. 595. Supreme Court. Dec. 23, 1899.)

[1]**Mining ground defined.** The act requiring ratification by stockholders of a mortgage by a company on its mining ground is not confined to land valuable for minerals under the mining act of congress, but covers any instance where land is held by a corporation and subjected to extraordinary processes of mining for commercial purposes, regardless of the chemical or geological character of the article mined or the economical success of the work.

Paint stone. A mortgage on ground worked for lustral or paint stone, worked and got by the ordinary modes of mining, pulverized, and the product sold to be made into paint, is a mortgage on mining ground and within the statute.

Expert testimony that the land has no value as mining ground was based on a false standard; a test which would make the question dependent upon too many uncertain and varying contingencies.

The act is limited to mining ground and its appurtenances and does not apply to other realty of the corporation.

Commissioners' decision. In Bank. Appeal from Superior Court, Napa County.

Action by J. J. Johnson against the California Lustral Company. From a judgment for plaintiff, defendant appeals. Reversed.

FITZGERALD & ABBOTT, SAM BELL MCKEE, and R. B. MEYERS, for appellant.

[1]A mining claim defined. *Williams* v. *Santa Clara Assn.* 66 Cal. 194; 5 Pac. 85.

The word "mining claim" includes a patented mine under Spanish grant. *Bewick* v. *Muir*, 83 Cal. 368; 23 Pac. 389.

The term mining claim is often used as synonymous with location. *McFeters* v. *Pierson*, 15 Colo. 201; 24 Pac. 1076.

The term mining ground as used in statutes, includes the ditch and water rights by which the mine is operated. *McShane* v. *Carter*, 80 Cal. 310; 22 Pac. 178.

E. M. GIBSON and WELLES WHITMORE, for respondent.

BRITT, C. Suit to foreclose a mortgage made by defendant to secure payment of its two promissory notes, each for the sum of $5,236, besides interest. The property mortgaged is a tract of land owned by defendant containing about 104 acres. The defense is founded on the act of the legislature entitled "An act for the further protection of stockholders in mining companies," approved April 23, 1880 (St. 1880, p. 131); the first section whereof provides among other things, that "it shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, * * * unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation." The court below found that defendant is

The word "lode" is used as synonymous with "lode mining claim." *Buckeye Co.* v. *Carlson*, 16 Colo. App. 446; 21 M. R. —.

Mine on land of ranch patent is not a "mining claim." *Morse* v. *DeArdo*, 107 Cal. 622; 40 Pac. 1018.

Land entered under a mineral entry, which has not been worked as a mine for many years, is not a mine under a special act allowing sale of mines of decedents. *In re Byrnes Estate*, 112 Cal. 176; 44 Pac. 467.

Lands valuable chiefly for granite are "mineral lands" within the meaning of the exception in the act of July 2, 1864, from the grant to the Northern Pacific railroad. *Northern Pacific Ry.* v. *Soderberg*, 188 U. S. 526.

It is only when lands containing petroleum, etc., are chiefly valuable for their mineral product that they are reserved against homestead entry. Such question of fact is to be determined by the land department. *Bay* v. *Oklahoma Co.*, 13 Okla. 425; 73 Pac. 936.

A homestead entryman may be defeated by showing that the land is more valuable for mineral purposes at any time before final proof. *Id.*

A homestead entryman has the better right to possession as against a mining claimant without valid discovery. *Id.*

Four adjoining claims and the mill used to operate them, treated as one mine. *Thompson* v. *Wise Boy Co.*, — Ida. —; 74 Pac. 958.

a mining corporation, and that said mortgage has never been ratified by the holders of its stock in accordance with the provisions of said statute. But the court further found that the land covered by the mortgage "was and is not mining ground, as specified by said statute, but was and is agricultural land." There was judgment of foreclosure as prayed by plaintiff.

The question most in dispute at the trial was upon the character of the mortgaged premises,—whether "mining ground," within the meaning of said statute, or not. There was evidence without conflict that defendant bought the land for mining purposes, and engaged in the business of taking from a portion thereof, through a tunnel and sundry other excavations, certain rock which defendant called "lustral" or "paint stone," pulverizing the same by means of machinery on the ground, and selling and attempting to sell the product thus obtained, which was to some extent used in the manufacture of paint, and was of some utility for that purpose. Defendant had a mill building on the premises 60 by 140 feet in size, which was "pretty well filled" (such was the testimony) with machinery for drying and crushing the rock. Such business was carried on at and prior to the time of the execution of said notes and mortgage. Some time afterwards defendant ceased operations, and failed in its said business; the total sales of the product having been less than one thousand dollars. A witness produced as an expert testified for plaintiff that he considered said rock to be a common country formation; that it was not mineral bearing, though it had a very small percentage of mineral in it; that it was not valuable for mining ground. It appeared from his evidence, however, that the rock lies in strata, and is different from other formations on the land; also that he considered mining ground to be such as produces mineral in paying quantities. He was asked: "If you mine rock from the earth, and you draw from that rock such mineral as pro-

duces paint or polish, don't you mine for that?" and replied, "That would be mining, if the mineral was there in paying quantities." There was other evidence tending to show that the land was chiefly valuable for agricultural purposes.

The defense relied on is hardly conscionable, under the circumstances appearing, and it is with reluctance that we conclude that the decision of the court respecting the character of the land, within the contemplation of the act of 1880, is contrary to the evidence. But the statute declares unlawful a mortgage or other disposition by the directors of the whole or any part of the mining ground of a mining corporation, except upon the ratification of the holders of two-thirds of the stock, and it must be enforced according to its intent. Several instances of its application have occurred. *McShane* v. *Carter,* 80 Cal. 310, 22 Pac. 178. *Pekin M. Co.* v. *Kennedy,* 81 Cal. 356, 22 Pac. 679. The question is upon the meaning of the terms "mining ground," employed in the statute. It has been suggested that these words should be understood as the equivalent of "lands valuable for minerals" and "valuable mineral deposits," in the statutes of the United States relating to the sale of those parts of the public domain so designated (U. S. Rev. St. §§ 2318, 2319); and hence that land cannot be considered mining ground, under the aforesaid act of 1880, unless it is of such character that, had it been public land, it might have been located as a mining claim and purchased as such from the government. We think, however, that this understanding of the statute, if adopted would lead us into bogs and fens of uncertainty respecting its interpretation. In the first place, the decisions of the officers of the federal land department show that some lands have been held subject to location as mineral under the federal laws which can scarcely be regarded as the subject of mining in the ordinary sense. Thus, in *McGlenn* v. *Wienbroeer,* 15 Land Dec. Dep. Int. 370, the department ruled that public land, chiefly valuable for a

peculiar building stone thereon, was subject to entry under the mining laws, and not as agricultural land, although it was worked as a quarry only. And so of lands valuable only for deposits of marble (*Pacific Coast Marble Co.* v. *Northern Pac. R. Co.*, 25 Land Dec. Dep. Int. 233). Other rulings of similar import might be cited. Unless we are prepared to admit that an ordinary open stone quarry constitutes "mining ground," as meant in our statute, then we could not accept these rulings as a guide. On the other hand, it is said to have been held by the department in *Green* v. *Grumbley*, decided May 20, 1896, that the presence of a thick vein of coal in public land does not render its character mineral, when shown to be not susceptible of mining at a profit. Clark, H. & C. Min. Law Dig. p. 346. Also that bog iron is not a mineral. Id. p. 28. And in *Etling* v. *Potter*, 17 Land Dec. Dep. Int. 424, it was held that the presence of gold in land does not characterize it as mineral unless it is in paying quantities. It seems to us that if a California mining corporation should own and mine a thick vein of coal it would be impossible not to hold the ground so used to be its "mining ground," within the act of 1880, whether the operations should prove profitable or not; and so of land which it might own and mine for gold, although the mining might result in loss. In one instance the commissioner ruled that only land containing metalliferous ores should be regarded as mineral, but this decision was reversed by the secretary of the interior, and it seems to be now established as the rule of the department that "lands chiefly valuable for mineral deposits, of whatever kind or nature, may be properly disposed of under the mining laws." *Alldritt* v. *Railroad Co.* (Nov. 6. 1897) 25 Land Dec. Dep. Int. 349; *Pacific Coast Marble Co.* v. *Northern Pac. R. Co.*, 25 Land Dec. Dep. Int. 241.

Again, as we see the question whether "mining ground"

means the same thing as land subject to mineral entry, it is set at rest by the decisions of this court. Thus, it is held that a lien given by statute upon "mining claims" cannot be extended to mines operated on land held under Mexican grant or agricultural patent. *Morse* v. *De Ardo,* 107 Cal. 622, 40 Pac. 1018; *Williams* v. *Association,* 66 Cal. 193, 5 Pac. 85. Surely, however, lands of the latter class might constitute "mining ground." And in *Estate of Byrne,* 112 Cal. 176, 179, 44 Pac. 467, the foundation of the decision is that a mine or mining ground has no necessary identity whatever with mineral land patented as such by the United States. The case of *Ball* v. *Tolman,* 119 Cal. 358, 51 Pac. 546, arose under the statute imposing penalties on the directors of a mining corporation for omitting certain acts required of them in the course of the business. St. 1880, p. 134. One of the defenses set up was that the operations of the company, which ended in complete failure, were carried on in the bed of the Sacramento river, and were not "mining." The court said: "It is immaterial, if true, that the river bed where navigable was not subject to location as a mining claim. The company did mining there, or endeavored to do so, and expended money of the corporation in the effort, and the requirements of the law * * * cannot be evaded by showing that the company was wrongfully searching for gold in a navigable stream."

We suppose there can be no doubt that an actual mine—land subjected to the processes of mining—is "mining ground," in the sense of the statute. What, then, is a "mine," or what is "mining?" In *Rex* v. *Inhabitants of Sedgley,* 2 Barn. & Adol. 65, the question was whether certain property from which limestone was obtained, by means of tunneling and other excavations, to be used in smelting iron and in the manufacture of lime, constituted a mine. The court (per Lord Tenterden, C. J.), having adverted to an attempt by counsel to restrict the term "mine" to works

for the extraction of metals, proceeded: "If the existence of metal be necessary to constitute a mine, salt works, from which salt is obtained in the way this stone was obtained, will not be mines, nor, indeed, will coal works be mines. * * * And to deny the character of a mine to the works in question would, as it appears to us, be to depart from the ordinary and proper meaning of that word in the English language." In *Rex* v. *Brettell,* 3 Barn. & Adol. 424, the court held that similar works for obtaining fire-brick clay were a mine, saying: "In order to determine whether an excavation in the earth constitutes a mine or not, we are to look to the mode in which the article is obtained, and not to its chemical or geological character." In *Westmoreland Coal Co.'s Appeal,* 85 Pa. St. 344, it was held that, as to coal, a worked vein is a mine, and the court said: "By working the vein, it becomes a mine." In *Hartwell* v. *Camman,* 10 N. J. Eq. 128, it was held that paint stone found in strata below the surface of the soil, distinct from the ordinary earth, and worked by ordinary means of mining, will pass by the designation of "mines and minerals" in a deed. In *Ball* v. *Tolman,* 119 Cal. 358, 51 Pac. 546, dredging the bed of a navigable river for gold—which operations yielded no returns whatever— was yet held to be mining, and among the reasons assigned for the decision was that the method adopted was among the modes of placer mining. In *Hines* v. *Miller,* 122 Cal. 517, 55 Pac. 401, it was held that one engaged in the construction of shafts, tunnels, and the like, for prospecting and developing a mine, is engaged in mining as much as he who extracts gravel or ore from the mine. Suppose the shafts and tunnels should fail to strike profitable ore or gravel (which was probably the fact in *Hines* v. *Miller,* as the action was to enforce liens for unpaid labor done on the ground); would the operation be any the less "mining?" Or suppose some expert should testify that the ground explored was worthless for any purpose of profit; we think his opinion would hardly justify the

conclusion that the ground was not in fact mined, assuming, of course, that the operations were prosecuted in good faith.

We do not hold that the inferences to be deduced from the authorities cited would control the decision of all questions which may arise concerning the proper definition of a "mine" or "mining ground," for the phases in which such questions may occur are perhaps very varied; we think it clear that when a mining corporation, in good faith, works by ordinary mining processes deposits of stone or other mineral on land owned by it, with a view to utilizing the product for commercial purposes, the land thus worked and exploited is "mining ground," within the meaning of the act of 1880, whether the undertaking results in loss or profit, and whether sound judgment and discretion would approve that use of the land or not.

The expert testimony that the land mined is of no value as mining ground is of no consequence, for the reason, if none other, that in a case such as this it sets up a false standard, viz., that mining ground must be land bearing mineral in quantities which make it profitable for working,—a test which would make the question dependent upon the market demand for the product and the thousand varying contingencies of the cost of production.

There is no doubt, on the evidence, that some portions of the mortgaged land were actually mined by defendant with a view to profit, and as to those parts, together with the mill and other appurtenances (*McShane* v. *Carter,* 80 Cal. 310, 22 Pac. 178), the prohibition of the statute clearly applied. Whether the tract outside the six or eight acres upon which the mining operations seem to have been directly prosecuted ought to be considered as also within the statute, if proved to be worthless for mining purposes and not necessary to the working of the other, is a question not raised by the record and which we do not decide. The act does not relate to the real property of such a corporation generally, but only to its

mining ground. *Granite M. Co.* v. *Maginness,* 118 Cal. 139, 50 Pac. 269.

The judgment and order denying a new trial should be reversed.

CHIPMAN, C., and COOPER, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

ROXANNA GOLD MINING & TUNNELING CO. v. JAMES J. CONE ET AL.

(100 Federal 168. Circuit Court, D. Colorado. Dec. 27, 1899.)

Where two veins having apexes in different claims, unite on their dip, within the perpendicular extension of the side lines of another claim, the owners of the last claim cannot contest as to the rights in the vein beyond the point of union, since they have no interest in either vein.

Facts of the case. Explanation of plat. A vein was found in the Doctor Patent which extended through at least one end line and then ran into the Elizabeth Cooper patent which it was alleged to cross from side line to side line and then to enter within the Jack Pot lines. The Jack Pot was supposed on complainant's theory to have the same vein and a second vein which after leaving the Jack Pot side line crossed the Elizabeth Cooper towards or into the Doctor, which second vein, on its dip united with the Doctor vein at or above the Doctor 12th level. At this 12th level the Doctor vein had been followed on its dip north until it was within the vertical lines of complainant's Mountain Monarch patent: *Held*, that the complainant, having no apex, the vein below the point of union belonged to the Doctor, which had an apex, or to the E. C., which might have an apex, and that it ought not to be assumed in a controversy to which the E. C. owners were not parties that the vein in the E. C. so crossed its side lines as to have no extra lateral rights.

Bill to restrain work in a mine.

The map referred to in opinion is found on page 329.

DINES & WHITTED, JOSEPH C. HELM, and W. D. REID, for complainant.

It is an abuse of discretion to allow an injunction on the mere chance that the vein worked would apex in plaintiff's ground. *Montana Co.* v. *Boston Co.*, 20 M. R. 1.

A patentee following his vein beyond his side line, the vein crossing both side lines, is liable in trespass for taking ore from such vein between vertical planes through the end lines of junior patent covering apex. *S. Nevada Co.* v. *Holmes Co.* (Nev.), 73 Pac. 759.

THOMAS, BRYANT & LEE and MORRISON & DE SOTO, for respondents.

HALLETT, District Judge (orally). This is a bill to restrain work upon a mine. The complainant charges that it owns the Mountain Monarch lode mining claim, in the Cripple Creek district, county of Teller, and that the respondents are taking ore from within the surface lines at a considerable depth underground. Complainant's title to the Mountain Monarch claim is not disputed, nor is the charge denied that the respondents are removing ore from the claim. Without stating the pleadings at length, or the matters set forth in the affidavits in respect to the contentions of the parties, it appears that respondents are operating from another claim south of the complainant's claim, called the "Doctor," and that they have descended into the ground in controversy, following the Doctor vein from the Doctor location upon the dip; the lode which in the pleadings and in the affidavits is called the "Doctor" vein having a dip to the north from that location. The position of the respondents is that there is but one vein having a continuous course through the Doctor location, and that is the vein which they have followed from the Doctor location to and under the Mountain Monarch location. Complainant contends that there are two veins in that locality, one which is called the "Jack Pot" vein, and another called the "Doctor" vein, the latter being the one

It is not necessary to claim extralateral rights that the vein pass through both end lines of the location. *Id.*

Sufficient complaint in ejectment for recovery of extralateral rights. *Davis* v. *Shepherd*, 31 Colo. 141; 72 Pac. 57.

If a lode apexes outside a demised claim so as not to belong to the lessor, it is no parcel of the claim demised. *McMillan* v. *Frank*, — Mont. —; 75 Pac. 685.

Consideration of evidence in contempt proceeding as to whether or not certain veins had been adjudicated in apex case upon which the contempt was predicated. *State* v. *District Ct.*, — Mont. —; 75 Pac. 956.

under which respondents claim. The Mountain Monarch and the Doctor claims are not contiguous. The two locations are some distance apart, and in the space intervening between the two locations is a claim called the "Elizabeth Cooper." According to complainant's theory, one of these veins—the Doctor vein—has an apex in the Doctor location at the point in controversy, and from the west end of that location to a distance eastward 600 feet or more. The other vein, called the "Jack Pot," has an apex north of the Doctor location, and in the territory of the Elizabeth Cooper location, at the west end line of the Doctor, which enters the Doctor location a considerable distance north of the west end line, and through the north side line of the Doctor, and passes on through that claim. Complainant has filed a map made by the surveyors, who support complainant's application with affidavits which show the location of the apex of each of these veins, the Doctor and the Jack Pot. Looking at this map, the apex of the Doctor vein crosses the west end line of the Doctor location, and passes eastward through that location. The apex of the Jack Pot vein is in the Elizabeth Cooper territory, and a little north of the Doctor location, at the west end line of that location, and enters the Doctor location a short distance east of the west end line of that location, and through the north side line. Accepting this statement of fact in respect to the position and extension of these two veins, it seems that the complainant has not the apex of the Doctor vein or of the Jack Pot vein at any point within its location.

Upon the complainant's case as presented, and without referring to the defendants' attitude in respect to the condition of things underground, these two veins coming together on their dip within the territory of the Mountain Monarch, the ore will belong in that territory to the owner of the apex of one or the other of these veins. The complainant, not asserting or claiming title through and by means of the apex of one

or the other of the veins, fails to show title as to either of them. According to the complainant's statement of the position of the Jack Pot vein, the Doctor location would have no right to follow that vein into the ground in controversy. That right would be in the owners of the Elizabeth Cooper location; and the Doctor locators, the respondents in this bill, would have a right, owning the apex within their territory, to follow the vein into the ground in controversy, subject to the prior right of the Elizabeth Cooper locators, assuming that to be the older of the two locations.

In other words, upon the case as stated by the complainant, the ownership of this ore stands between the Elizabeth Cooper people and the Doctor people, and not between the complainant and the Doctor people. The existence of the Doctor vein and its continuity to the place in controversy seems not to be questioned by the complainant. Complainant relies entirely upon the circumstance, which it alleges to be true, that there are two veins in that locality which unite at the tenth level, or between the tenth and twelfth levels, in the Moutain Monarch territory. So understood, the right is not with the complainant in either case. It must be with the owners of the Elizabeth Cooper or with the owners of the Doctor claim.

In this view, I think the motion for injunction should be denied. As the circumstance of the location and situation of these veins is perhaps not very fully explained, or not as fully explained as it may be at some other time, this ruling will be subject to the right of the complainant to renew its motion, if any different condition of affairs shall be developed in the territory in controversy.

ON MOTION FOR REHEARING.

(February 7, 1900.)

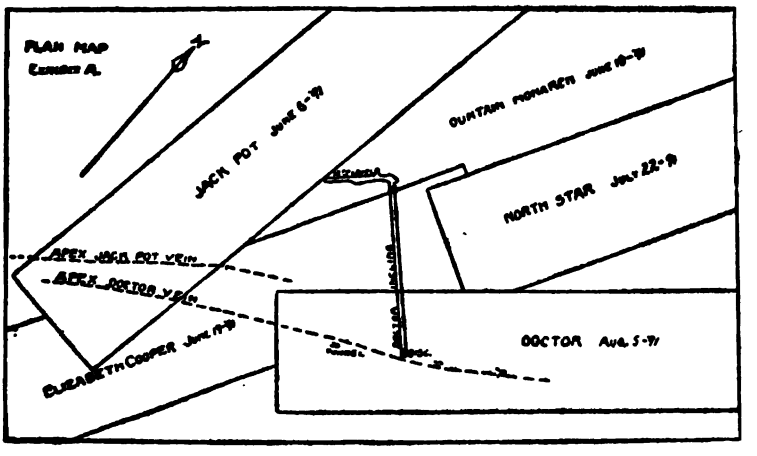
HALLETT, District Judge (orally). This is a bill to enjoin work in a mine. A motion for injunction was heard and denied at this term. Counsel have within a few days back reargued the questions presented in the record. In this argument it appears that the opinion rendered by the court at the first hearing was not understood by counsel. Complainant is the owner of a claim called the "Mountain Monarch," and at some small distance south of that location there is another location called the "Doctor," which is owned by respondents. It is shown in the record that respondents have followed a vein upon their location which has a dip to the north, through and across an intervening claim called the "Elizabeth Cooper," and into the territory of the Mountain Monarch location. Complainant asserts that there is another vein having its apex in the Elizabeth Cooper location, and at some distance east of the west end line of the Doctor location, and there entering the Doctor location. This last-mentioned vein is called by complainant the "Jack Pot" vein. Complainant's theory is that this vein unites with the vein found by respondents, and called the "Doctor" vein, at a considerable depth from the surface, within the Mountain Monarch ground, and in the neighborhood of the tenth and twelfth levels. The situation, then, as put by the complainant, is that there are two veins, uniting in their descent into the earth, within their territory, and the apex of one of those veins is in the Doctor claim, and the apex of the other of the veins is in the Elizabeth Cooper territory. This is the state of affairs at the west end of the Doctor claim, and for 200 feet east from that point, which would cover the ground in controversy in the Mountain Monarch claim or some portion of it.

The decision of the court at the first hearing was that the

complainant, not having the apex of either vein, was in no position to claim the ore in its ground, whether it should be in one vein or the other. That ruling is based upon the last clause of section 2336 of the Revised Statutes, which declares: "Where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." Under this statute, it was said that the controversy must lie between the owners of the Elizabeth Cooper territory and the owners of the Doctor territory, and that would depend upon whether the one or the other was the older location, because this statute says that, in case of the union of veins in their descent into the earth, the oldest or prior location shall take the vein below the point of union. That is the matter which counsel seem not to have understood.

The last argument by complainant's counsel was directed to the question whether the Elizabeth Cooper locators could claim the ore in the Jack Pot vein because of the location of their claim in such manner that the apex must traverse the claim from side to side, and not through the end lines. That is a matter of which we are in no situation to speak. The owners of the Elizabeth Cooper claim are not parties to this suit; therefore they cannot be heard in this suit to say whether the position of the vein is here or there in their location. Whether it be true that the Elizabeth Cooper claimants may follow this vein called the "Jack Pot" into the depths of the earth, and under the Mountain Monarch location, or not, as between these parties the result is the same. If the Elizabeth Cooper people are not in a position to follow the Jack Pot vein under the Mountain Monarch location, and if that be the elder location as between that location and the Doctor location, then the Doctor location may hold the ore under that branch of the vein which outcrops in its territory. Nothing is alleged against the outcrop of the Doctor vein. It appears affirmatively in this record that it follows

the course of the location across the western end line of the Doctor claim, and for 600 feet east from that point. So that the proposition declared at the first hearing is still true,—the ownership of the ore in question under the Mountain Monarch location is a matter which may be in issue between the Elizabeth Cooper people and the Doctor people, but no issue can be raised in respect to it by the Mountain Monarch people, from the facts as shown in this record. The motion for rehearing will be denied.



ENOS COSTA v. JOSEPH SILVA.

(127 California 351; 59 Pac. 695. Supreme Court, Dec. 29, 1899.)

Working together and accepting plaintiff's share of patent expenses proves trust. Plaintiff purchased an undivided one-fourth interest in a mining claim, but took no deed, and the parties went into possession, and worked the claim jointly for a number of years. Defendant recognized plaintiff's interest, and requested and received payment for one-fourth of the expense of securing a patent, but refused plaintiff a deed of his interest. *Held*, that defendant held one-fourth of the land in trust, and that plaintiff was entitled to a deed therefor.

A judgment supported by the findings will not be reversed on appeal because of a finding, on an immaterial matter, contrary to the evidence.

Evidence that the defendant requested and received money from plaintiff to pay a portion of the expense in securing a patent to a mining claim is admissible to show that defendant held a portion of the claim in trust for plaintiff.

Opinion evidence when immaterial. Where plaintiff testified to facts showing himself entitled to a one-fourth interest in a mining claim, of which defendant held the legal title, the fact that a portion of such testimony objected to and received was matter of opinion was not reversible error.

Proof of creation of trust, by series of letters. *Loring* v. *Palmer*, 118 U. S. 321.

Patentee declared to hold in trust where owner had given him money to buy it in at tax sale. *O'Connor* v. *Irvine*, 74 Cal. 435; 16 Pac. 236.

Plaintiff surrendered possession, agreed to not adverse, and paid his proportion of the expenses of application. Defendant to perfect to patent and convey an interest to plaintiff. *Held*, not sufficient to take the case out of the statute of frauds. *Ducie* v. *Ford*, 138 U. S. 587.

An agreement that one shall procure the conveyance of land to another who shall pay for it, both to open and work a quarry thereon is not within the statute. *Treat* v. *Hiles*, 68 Wis. 344; 60 Am. Rep. 858; 32 N. W. 517.

One of several associates buying the property for himself held a trustee for the excluded associates. *Canfield* v. *Jeannotte*, 31 Colo. 292; 72 Pac. 1062.

Department 2. Appeal from Superior Court, Siskiyou County.

Action by Enos Costa against Joseph Silva. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

WARREN & TAYLOR, for appellant.

GILLIS & TAPSCOTT, for respondent.

PER CURIAM. This is an appeal by defendant from a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial. The case is here on the judgment roll and bill of exceptions. It appears from the unchallenged findings as follows: That about 24 years ago the plaintiff bought a one-fourth interest in a certain mining claim described in the complaint, containing 63.51 acres, and paid therefor the sum of $400, but took no deed for the same. That both plaintiff and defendant went into possession of said claim, and each had a residence thereon, and for a number of years they worked said claim jointly. That during their residence thereon they each cultivated a portion thereof, and that defendant has continued to reside thereon from the time plaintiff first went into possession up to the present time. That a short time prior to the middle of October, 1896, the defendant recognized the one-fourth interest of plaintiff in and to said claim, and then proposed to plaintiff that they take steps to get a patent to said claim jointly; that plaintiff should pay one-fourth of the expenses of getting the patent, and that the defendant should pay three-fourths, to all of which plaintiff agreed. That they then jointly had the said claim surveyed, and plaintiff, at the request of defendant, contributed his services in making the survey and paid a portion of the expenses thereof. That

plaintiff understood that the patent to said claim would be procured in the names of plaintiff and defendant jointly, and they went to the office of their attorneys, in Yreka, who had been employed to procure the patent for them, and each paid a portion of the expenses necessary to obtaining said patent. That plaintiff paid towards the expense of surveying the claim and getting a patent the sum of $45. That prior to October, 1896, the defendant made application under the Revised Statutes of the United States, to purchase the said claim, and thereafter, about the middle of October, 1896, made final proof in the United States land office at Redding, in Shasta county, and received a certificate of purchase therefor in his own name. That, after the said certificate of purchase was so issued to the defendant, plaintiff demanded of defendant a deed to a one-fourth interest in and to said claim, and defendant then refused, and still refuses, to execute or deliver such deed or any deed to plaintiff.

As conclusions of law, the court found that the defendant holds the undivided one-fourth of said claim in trust for plaintiff, and that plaintiff is entitled to a deed from defendant for said one-fourth interest. A decree was accordingly entered.

We think the above findings support the judgment. The plaintiff having paid for a one-fourth interest in the property, the defendant for many years having recognized this interest, and the plaintiff finally, in pursuance of the understanding of the parties, having contributed towards the expense of surveying the claim and procuring the title thereto, the title, when procured, was for the benefit of plaintiff as well as defendant, in proportion to his interest therein. To now allow the defendant, in violation of his agreement, to keep the property for which plaintiff has paid his money and labor, would be the most flagrant injustice. If a court, under such circumstances, could not afford relief, it would be a sad commentary upon the law.

The defendant challenges the sufficiency of the evidence to sustain findings 8 and 9 and portions of finding 4. Without passing upon the question as to whether the evidence is sufficient in the respects specified, it clearly appears that the judgment is supported by the findings other than those attacked. While findings 8 and 9 and the portions of finding 4 to which our attention is called are not necessary to support the judgment, yet they are not inconsistent or in conflict with the ultimate findings upon which the judgment rests. In such case, they may be disregarded. A finding contrary to the evidence, upon an immaterial matter, is not prejudicial error, if the ultimate facts found support the judgment.

Certain questions were asked of the witness Solus and of plaintiff, while a witness upon the stand, for the purpose of showing that in 1896, before the defendant filed his application for the claim, he asked plaintiff to contribute towards his one-fourth interest, and help pay for the surveying, and that plaintiff did at that time pay $40 towards the survey. The evidence was objected to by defendant upon the ground that it was incompetent, irrelevant, and an attempt to prove a contract concerning real estate by parol. The court overruled the objections, and the rulings are assigned as error. We think the evidence was material, and it was not offered for the purpose of proving a parol agreement to convey land. It was competent for the purpose of showing that plaintiff paid money to defendant at his request, and for the purpose of procuring the title for the common benefit of plaintiff and defendant. Where a transfer of real property is made to one person, and the consideration thereof is paid by another, a trust is presumed to result in favor of the person by whom the payment is made. It has always been held competent to prove by parol the payment of the consideration. The plaintiff testified that 24 or 25 years ago he first went to live on the claim; that he worked there, mining, for three years with defendant; that he had then bought and paid for a one-fourth

interest, and claimed such interest; that defendant bought his interest one year before plaintiff. The plaintiff was then permitted to testify, under defendant's objection, that they divided the money taken from the mine; that plaintiff received one-fourth of it; and that defendant recognized his one-fourth interest in the mine. Part of the testimony was a mere opinion of the witness, but he stated the facts fully in other parts of his testimony, and we do not think the objectionable part of sufficient importance to make it ground for reversal. The findings concerning which no complaint is made support the judgment. The testimony in the record is without conflict. The defendant did not deny the facts as stated by plaintiff.

The judgment and order are affirmed.

OTHO IAMS ET AL. v. THE CARNEGIE NATURAL GAS CO.

(194 Pennsylvania 72; 45 Atl. 54. Supreme Court. Dec. 30, 1899.)

[1]**No obligation to work without profit.** Under a lease providing that if gas be found in sufficient quantities to justify marketing the same the lessee is bound to market the gas if so found, or show some good reason to the contrary. He is not, however, bound to market the gas at a loss, but only at a reasonable profit and in determining whether it could be marketed the expense and all other surrounding incidents would have to be considered.

[2]**Tenant bound to operate.** When the relation of landlord and tenant exists and the product sought for has been found the tenant is under "obligations to operate for the common good of both parties and to pay the rent or royalty reserved."

Appeal from the Court of Common Pleas, Allegheny County.

Action by Otho Iams and others against the Carnegie Natural Gas Company for rent or royalty under a natural gas lease. Judgment for plaintiffs. Defendant appeals. Affirmed.

EDWIN W. SMITH, P. C. KNOX, JAMES H. REED, and GIBSON D. PACKER, for appellant.

JAMES M. GARRISON and FRANKLIN P. IAMS, for appellees.

[1]*Colorado F. & I. Co.* v. *Pryor*, 19 M. R. 544. *Young* v. *Forest Oil Co.* 20 M. R. 345. *Indianapolis Co.* v. *Teeters*, 18 M. R. 391. Donohue on Oil, 166.

No rental on exhausted oil well. *Williams* v. *Guffy*, 18 M. R. 478.

[2]*Aye* v. *Philadelphia Co.*, 20 M. R. 177. *Huggins* v. *Daley*, 20 M. R 377. *Koch's App.*, 4 M. R. 151.

or the other of the veins, fails to show title as to either of them. According to the complainant's statement of the position of the Jack Pot vein, the Doctor location would have no right to follow that vein into the ground in controversy. That right would be in the owners of the Elizabeth Cooper location; and the Doctor locators, the respondents in this bill, would have a right, owning the apex within their territory, to follow the vein into the ground in controversy, subject to the prior right of the Elizabeth Cooper locators, assuming that to be the older of the two locations.

In other words, upon the case as stated by the complainant, the ownership of this ore stands between the Elizabeth Cooper people and the Doctor people, and not between the complainant and the Doctor people. The existence of the Doctor vein and its continuity to the place in controversy seems not to be questioned by the complainant. Complainant relies entirely upon the circumstance, which it alleges to be true, that there are two veins in that locality which unite at the tenth level, or between the tenth and twelfth levels, in the Moutain Monarch territory. So understood, the right is not with the complainant in either case. It must be with the owners of the Elizabeth Cooper or with the owners of the Doctor claim.

In this view, I think the motion for injunction should be denied. As the circumstance of the location and situation of these veins is perhaps not very fully explained, or not as fully explained as it may be at some other time, this ruling will be subject to the right of the complainant to renew its motion, if any different condition of affairs shall be developed in the territory in controversy.

ON MOTION FOR REHEARING.

(February 7, 1900.)

HALLETT, District Judge (orally). This is a bill to enjoin work in a mine. A motion for injunction was heard and denied at this term. Counsel have within a few days back reargued the questions presented in the record. In this argument it appears that the opinion rendered by the court at the first hearing was not understood by counsel. Complainant is the owner of a claim called the "Mountain Monarch," and at some small distance south of that location there is another location called the "Doctor," which is owned by respondents. It is shown in the record that respondents have followed a vein upon their location which has a dip to the north, through and across an intervening claim called the "Elizabeth Cooper," and into the territory of the Mountain Monarch location. Complainant asserts that there is another vein having its apex in the Elizabeth Cooper location, and at some distance east of the west end line of the Doctor location, and there entering the Doctor location. This last-mentioned vein is called by complainant the "Jack Pot" vein. Complainant's theory is that this vein unites with the vein found by respondents, and called the "Doctor" vein, at a considerable depth from the surface, within the Mountain Monarch ground, and in the neighborhood of the tenth and twelfth levels. The situation, then, as put by the complainant, is that there are two veins, uniting in their descent into the earth, within their territory, and the apex of one of those veins is in the Doctor claim, and the apex of the other of the veins is in the Elizabeth Cooper territory. This is the state of affairs at the west end of the Doctor claim, and for 200 feet east from that point, which would cover the ground in controversy in the Mountain Monarch claim or some portion of it.

The decision of the court at the first hearing was that the

WILLIAM COLGAN v. THE FOREST OIL CO.

(194 Pennsylvania 234; 45 Atl. 119. Supreme Court. December 30, 1899.)

[1]**Courts of equity will not enforce an implied covenant** in an oil and gas lease the extent of such implied covenants depending wholly on oral evidence of opinion.

There is no relation of special trust or confidence between lessor and lessee in gas or oil leases, any more than in any other. Like all other contracting parties they deal at arm's length, each for his own interest. So long as the question is one of business judgment and management, the lessee is not bound to work unprofitably to himself for the profit of the lessor, and the parties must be left as in other cases to their own ways. It is only when a manifestly fraudulent use of opportunities and control is shown that courts are authorized to interfere.

One lessee of two lessors on adjoining tracts. If a lessee of oil and gas lands derive some collateral or incidental advantages from his lease of the adjoining territory he is entitled to them, just as a stranger would be. He may operate the two leases jointly, at less expense, or he may be helped in other ways by having both under one management. It is only when wells on adjoining territory are being fradulently used to drain the lessor's land that courts have any occasion to interfere.

[2]**When not bound to sink "offset" well.** A lessee of adjoining oil lands of different persons, though putting down a well on one tract near the dividing line, is not bound to put one down as an offset on the other side, if, being lessee of this tract only, it would not be profitable for him to do so.

Idem. A lessee of oil lands, who has expressly covenanted only to put down one oil well on the premises, and who has put down several on one side of the lands, cannot be compelled, under any implied covenant, to put down a well on the other half, or to surrender such half, unless it is clearly shown that he is not acting in good faith on his business judgment, but fraudulently, with an intention to obtain a dishonest advantage.

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[1]*Young* v. *Forest Co.* 20 M. R. 345. *Harris* v. *Ohio Co.* 19 M. R. 157.

[2]Implied covenant to get all oil possible though not contracted for. *Kleppner* v. *Lemon*, 18 M. R. 404.

An oil lease contains implied covenant for diligent operation

Appeal from Court of Common Pleas, Allegheny County.

Suit by William Colgan against the Forest Oil Company. Decree for plaintiff. Defendant appeals. Reversed.

J. McF. CARPENTER and R. W. CUMMINS, for appellant.

J. K. P. DUFF, for appellee.

MITCHELL, J. This is a bill in equity by lessor against lessee for specific performance of covenants, or, in the alternative, for forfeiture of the lease, and also for an account. As the covenants are merely implied, and their extent depends altogether on oral evidence of opinions, the case for relief is wholly wanting in that precision and certainty of contractual duty which is necessary to sustain the ordinary chancery decree for specific performance. The jurisdiction of equity in a similar case was, however, sustained in *Kleppner* v. *Lemon*, 176 Pa. St. 502, 35 Atl. 109, and we do not now propose to question it. But that decision was on the ground of fraud,

after oil is struck. *Acme Oil Co.* v. *Williams*, 140 Cal. 681; 74 Pac. 296.

There is an implied covenant in an oil lease that work will be prosecuted within a reasonable time and forfeiture will be decreed in default thereof. *Logan Co.* v. *Great S. Co.*, 126 Fed. 623.

But there will be no forfeiture decreed where lessee is in possession for want of full compliance—plaintiff being remitted to his action for damages. *Kellar* v. *Craig*, 126 Fed. 630.

Lessee adjudged in damages for working one lease and neglecting another on adjoining land. *Kleppner* v. *Lemon*, 198 Pa. 581; 21 M. R. —.

Lease granted right of mining for petroleum "or other valuable volatile substance." A later lease to others was made for natural gas: *Held*, a question of fact whether natural gas was a volatile substance so as to infringe on the rights of the first lease. *Ford* v. *Buchanan*, 111 Pa. 31; 2 Atl. 339.

Three contiguous farms rented under oil lease; the lessor devised the farms to different persons. *Held*, that the devisees should di-

the majority of the court being of opinion that the defendant was fraudulently evading his obligations to plaintiff while draining the oil from plaintiff's land through wells on adjacent territory. "The findings show," says Williams, J., "that it is the expressed purpose of the defendant to secure Kleppner's oil through his wells on the Garlach and Stotler tracts of land." The basis necessary to sustain the bill, therefore, is fraud, and that, of course, must be affirmatively and clearly proved.

There is no relation of special trust or confidence between lessor and lessee in gas or oil leases, any more than in any other. Like all other contracting parties, they deal at arm's length, each for his own interest. So long as the question is one of business judgment and management, the lessee is not bound to work unprofitably to himself for the profit of the lessor; and the parties must be left, as in other cases, to their own ways. It is only when a manifestly fraudulent use of opportunities and control is shown that courts are authorized to interfere.

The defendant contracted by its lease to put down one well on the plaintiff's land. It has in fact put down five. The bill charges, however, that the five were put down on the eastern half of the farm, to the neglect of the development of the western half; and further that, although five wells were sunk on the eastern side, yet defendant was unduly draining that part of the land by wells on adjoining territory leased

vide the royalty although the wells were all on one farm because the one well would drain all three farms. *Wettengel* v. *Gormley*. 18 M. R. 93.

Construction of joint lease by adjoining mine owners where one of them has sold his half to the lessee. Lessee held to pay proper royalty to the remaining lessor. *Higgins* v. *California Co.*, 109 Cal. 304; 41 Pac. 1087.

In such a case the lessee cannot make use of a privilege to take asphalt from any part of the tract and so take only from his own part. *Id.*

from other owners. As to this latter complaint, the bill asked that such outside wells "be decreed to be wells taking and draining the oil from plaintiff's said land," and that an account and payment be ordered. The plaintiff's case, however, was so absolutely wanting in merit on this branch, that the learned judge below not only granted no relief, but did not even discuss it in his conclusions of law. It would not be necessary, therefore, for us to consider this part of the case at all, were it not that the evidence throws a very strong light on the main question of good faith in the defendant's whole plan of operations for the development of the farm.

As already said, defendant's contract obligation was to sink one well. It has sunk five. One of these, known as "Colgan No. 5," it was desirable, in defendant's judgment, to locate very near the line of another lessor, Caldwell. Defendant accordingly consulted both plaintiff and Caldwell, who both agreed to the location chosen, with the notice from defendant to plaintiff that, if it proved a paying well, defendant would, in justice to Caldwell put down another on Caldwell's side of the line, as an offset. This was done. The well on plaintiff's side of the line proved a fair producer, though it declined after a few weeks; and the other well was then sunk on Caldwell's side, and proved about an equal producer. This second well, known as "Caldwell No. 4," is the chief subject of plaintiff's complaint, and request for an account. It is quite apparent, as the learned judge reports, that each of these wells draws its supply partly from the other's territory; but this was foreseen, and an express agreement made as to the location of the first one, and the necessity for the second "as an offset." The plaintiff's bill, therefore, on this branch, is conclusively met by his own agreement beforehand to the conduct he now complains of. In cases of this kind, arising from conflicting claims as to the territory from which the supply of any particular well is drawn, the rights and duties of the parties must be determined by their contracts. As be-

tween the parties, each lease must stand upon its own terms. The obligations, for example, of the defendant to the plaintiff, depend on the lease from the latter to the former, and are not in any way increased or diminished by other leases from other parties. If the defendant derives some collateral or incidental advantages from its leases of adjoining territory, it is entitled to them just as a stranger would be. It may operate them jointly at less expense, or it may be helped in other ways by having both under one management. It is only when the wells on adjoining territory are being fraudulently used to drain the complainant's land that courts have any occasion to interfere. The practical test is to be found in the question, are the outside wells, as, for example, the Caldwell, draining the Colgan wells to such an extent that, if the former were operated by a third party, the defendant, as lessee of the latter, would find it good management to put down another well to save its own leased territory from exhaustion? If so, then good faith to its lessor would require it to put down the additional well, that the lessor might get his proper royalty. But, if not, the latter has no cause of complaint. If plaintiff, as owner, would not find it profitable to put down a well to stop his neighbor's drainage of his land, the lessee cannot be held to any higher obligation. He is not bound to work at his own loss for his lessor's profit. In the present case, so far from establishing any fraud, the plaintiff has clearly shown the entire good faith of the defendant.

On the other branch of the case the court below found that the western half of the farm "would furnish at least one paying well," and decreed that a well should be put down by the appellant. There is unfortunately no evidence whatever to support this finding. Not a single witness says so, and three experienced operators examined by defendant testify positively as to their judgment that another well would not pay for its cost. All that the plaintiff showed was that there are

several wells on farms adjoining the west half which are producing oil. How much was not shown, nor whether any one of them had paid for its cost. On the other hand, the defendant's witnesses testified that these wells were light producers, and while they, being down, can now be worked at a profit, yet they have not paid for their cost, and are a positive disproof of the wisdom of putting down another.

The extent of plaintiff's own testimony was that he thought he "could get plenty of other parties to take" the land, "but I will do it myself." This is very far short of what is required. So long as the lessee is acting in good faith on business judgment, he is not bound to take any other party's, but may stand on his own. Every man who invests his money and labor in a business does it on the confidence he has in being able to conduct it in his own way. No court has any power to impose a different judgment on him however erroneous it may deem his to be. Its right to interfere does not arise until it has been shown clearly that he is not acting in good faith on his business judgment, but fraudulently, with intent to obtain a dishonest advantage over the other party to the contract.

Nor is the lessee bound in case of difference of judgment, to surrender his lease, even pro tanto, and allow the lessor to experiment. Lessees who have bound themselves by covenants to develop a tract, and have entered and produced oil, have a vested estate in the land, which cannot be taken away on any mere difference of judgment. It is not within the jurisdiction of any court to oust the owner and forfeit the title to estates in that way, and the jurisdiction of equity to decree any specific act or declare forfeiture depends on fraud averred and fully proved. Experimental drilling of other wells on the western portion of this track may work injury to defendant's wells already down, without any corresponding advantage to the plaintiff. The weight of the evidence is that such would be the probable result, but, whether it would

or not, the defendant is not bound to submit to the experiment. It has an estate in the whole tract, has fully performed its agreement in relation thereto, and not a single fact has been shown to authorize the court to interfere with its title or possession.

Decree reversed, and bill directed to be dismissed, with costs.

ANDREW B. YOUNG v. THE FOREST OIL CO. ET AL.

(194 Pennsylvania 243; 45 Atl. 121. Supreme Court, December 30, 1899.)

Misjoinder. Multifariousness. The joinder of the original lessees with successive assignees, amounting as to the principal defendant to an ejectment and as to the others a suit for damages, is demurrable for multifariousness.

[1]**Lessees right to use his own judgment.** A lessee of oil lands cannot, under any implied covenant, be compelled to put down a well on a certain part of the premises, on penalty of forfeiture of the lease, except on proof of fraud in fact. It is not enough that, as against his judgment that it would not be profitable, the lessor, or experts, or the court, or all of them, have a different opinion.

[2]**Testing, when not compelled.** A bill in equity will not lie by the lessor of an oil and gas lease against the lessee or his assigns, to compel the latter to test part of the leased land not yet drilled, or, upon his failure to do so, to surrender the land to the lessor, unless it is shown that the failure of the lessee to drill amounts to a fraud upon the rights of the lessor.

[3]**Oil in "paying quantities."** Where a lease is to continue as long as oil or gas is found or produced in paying quantities, the phrase, "found or produced in paying quantities," means paying quantities to the lessee or operator. If oil has not been found, and the prospects are not such that the lessee is willing to incur the expense of a well (or a second or subsequent well, as the case may be), the stipulated condition for the termination of the lease has occurred. So, also, if oil has been found, but no longer pays the expenses of production. But if a well, being down, pays a profit, even a small one, over the operating expenses, it is producing in "paying quantities," though it may never repay its cost, and the operation as a whole may result in a loss.

Appeal from Court of Common Pleas, Allegheny County.

Suit by Andrew B. Young against the Forest Oil Com-

[1]*Colgan* v. *Forest Oil Co.* 20 M. R. 338. *Iams* v. *Carnegie Co.*, 20 M. R. 335.

[2]*McClay* v. *West Pa. Gas Co.*, 201 Pa. 197; 21 M. R. —.

[3]Either party may quit when it ceases to pay. *Cassell* v. *Crothers*, 20 M. R. 160.

pany and others. Decree for plaintiff. Defendants appeal. Reversed.

J. McF. CARPENTER, GEO. J. WOLF, and R. W. CUMMINS, for appellants.

M. A. WOODWARD, for appellee.

MITCHELL, J. This is a bill by the lessor of oil land to declare a forfeiture of the lease for failure to develop the land, and for damages for draining it from wells on neighboring leaseholds, or, in the alternative, for a decree of specific performance of the implied covenant, by sinking additional wells. The jurisdiction in cases of this kind is discussed in *Colgan* v. *Forest Oil Co.* (ante p. 338), and we need only say now that it must be based and sustained on the ground of actual fraud. The bill is a striking example of the danger of dragging a controversy of this kind into a court of equity, where ordinarily it has no proper place. The bill joins as defendants the original lessee, who had parted with all his title more than seven years before bill filed, and all the successive assignees down to and including the Forest Oil Company, appellant, the only one now in possession or claiming title as lessee. No joint title, possession, or liability is averred or shown; and all the alleged trespasses, defaults, and breaches of covenant by the different assignees of the lease for a period of seven or eight years are pitched together into hotchpot, and each lessee made liable for the sum total, without regard to the statute of limitations, and whether the alleged injury was done before or during or after his interest or possession under the lease. As against the oil company, the principal defendant, it is nothing more than an ejectment bill for breach of covenant; and as to the other defendants it is a personal action for damages. It was demurred to for multifariousness and for want of equity. The demurrer should have been sustained on both grounds.

But without reference to the form of the remedy the case is wholly destitute of merit on the facts. The learned judge below found that "the west end of plaintiff's farm has been sufficiently developed, but we do not think the one well, No. 5, was a sufficient test for the north and east portion of the farm, especially as there was not a trace of oil or gas in it. * * * There remains a large portion of plaintiff's farm which * * * ought to produce oil in paying quantities, with a reasonable degree of certainty." And further: "In view of the foregoing findings, we conclude that under the circumstances of this case the defendant's refusal to sink additional wells on plaintiff's farm is a wrongful act, amounting to a fraudulent use of the lease, to plaintiff's injury." It is manifest that this conclusion proceeds from an erroneous view of the law, probably due to a misapprehension of the scope of the case of *Kleppner* v. *Lemon,* 176 Pa. St. 502, 35 Atl. 109. That decision was not meant to stretch the jurisdiction of equity beyond its regular and established limits, nor to blaze out any new path for proceedings on oil or gas leases, differing from ordinary remedies between lessor and lessee. It rested on fraud alleged and proved, and fraud in fact, not merely inferred from a difference of judgment between the defendant and the court as to the profitable development of the leased premises. In the present case the conclusion of the court rests on nothing else than such difference of judgment. There is not a scintilla of evidence for any other basis. The lessee contracted to put down one paying well. He did in fact put down five, four of which produced oil for a time. Even considering the plaintiff's side alone, the weight of the evidence in favor of the court's conclusion is exceedingly light. Passing over the plaintiff's extraordinary reasoning, that, because one well put down in the alleged insufficiently tested part of the farm proved to be a dry hole, therefore another hole in the same portion would produce a paying well, we have looked in vain for any testimony that

even the experts are willing to stake their judgments on any such result. Not a single witness says so. They say, and most of them on hypothetical questions, without personal acquaintance with the locality, that the indications are that it is "good oil territory." Mr. Carnahan, the witness best acquainted with the land, and apparently the most intelligent and competent expert examined, says: "The chances are that the hundred-foot sand" [the one from which all the oil has so far been produced] "is pretty well drained; but the hundred foot, in all probability, is not all the sand that is there." He therefore considered the property as having a value for development for the lower sand. But even he does not venture the opinion that it would be sound business judgment to spend four or five thousand dollars in sinking an additional well on the present prospects of its even repaying the cost. Even if he and all the others had said so, with sufficient positiveness to convince the court as a matter of judgment, it would not have been enough. The undisputed facts were that on the plaintiff's farm of 53 acres, five wells had been sunk; being as favorable a showing (see judge's seventh finding of facts), in proportion of wells to acreage, as much the greatest part of the surrounding territory. Four of the wells, however, were on or near the western portion of the farm, and only one on the other side, which proved dry. There was, therefore, a considerable intervening part of the farm on which no well had been sunk. The real question in the case was whether the omission to put a well in that portion of the land was fraudulent. There was not a scintilla of evidence to sustain any such conclusion, and without it there was nothing on which the bill could be supported. The operator, who has assumed the obligations of the lease, has put his money and labor into the undertaking, and is now called upon to determine whether it will pay to spend some thousands of dollars more in sinking another well to increase the production of the tract, is entitled to follow his own judg-

ment. If that is exercised in good faith, a different opinion by the lessor, or the experts, or the court, or all combined, is of no consequence, and will not authorize a decree interfering with him.

The plaintiff claimed that the lease had expired because oil was no longer produced "in paying quantities." The learned judge, while not deeming it necessary to determine the exact meaning of this phrase, nevertheless refused to decree any relief on this ground. In this he was clearly right. The phrase "found or produced in paying quantities" means paying quantities to the lessee or operator. If oil has not been found and the prospects are not such that the lessee is willing to incur the expense of a well (or a second or subsequent well, as the case may be), the stipulated condition for the termination of the lease has occurred. So, also, if oil has been found, but no longer pays the expenses of production. But if a well, being down, pays a profit,—even a small one, over the operating expenses,—it is producing in "paying quantities," though it may never repay its cost, and the operation as a whole may result in a loss. Few wells, except the very largest, repay cost under a considerable time; many never do; but that is no reason why the first loss should not be reduced by profits, however small, in continuing to operate. The phrase "paying quantities," therefore, is to be construed with reference to the operator, and by his judgment when exercised in good faith.

Decree reversed, and bill directed to be dismissed, with costs.

DEAN, J., dissents.

N. D. JONES v. THE FOREST OIL CO.

(194 Pennsylvania 379; 44 Atl. 1074. Supreme Court. January 2, 1900.)

Right to use force pump drawing oil from adjoining land. Defendant, having a right to drill for oil and gas on a farm adjoining plaintiff's, cannot be prevented from using a pump which, by its power, draws the oil from plaintiff's land, since defendant has the incidental right to use the most effective machinery, and plaintiff's property in the oil and gas in his land is not absolute until reduced to actual possession by being brought to the surface.

Appeal from Court of Common Pleas, Allegheny County.

Bill by N. D. Jones against the Forest Oil Company. From a decree in favor of defendant, plaintiff appeals. Affirmed.

Bill in equity for an injunction to restrain the defendant from using a gas pump in an oil well.

The facts appear by the opinion of Frazier, J., which was as follows:

The Indiana statute forbidding waste of natural gas is constitutional. *Ohio Co.* v. *Indiana*, 177 U. S. 190; 20 M. R. 466.

The Kentucky act making it a penal offence to allow gas to go to waste, construed and held valid. The act allows adjoining owners to plug the well where the owner leaves it idle and open. *Com.* v. *Trent* (Ky.), 77 S. W. 390.

Using the pumping station to overcome the friction in a pipe line is not increasing the natural pressure of the gas at the well. *Consumers Co.* v. *American Co.*, — Ind. —; 68 N. E. 1020. In *Manufacturers Co.* v. *Indiana N. G. Co.*, 20 M. R. 672, a gas well was enjoined from using artificial pressure to increase its flow from the supposed great common reservoir of natural gas.

Owner has right to explode torpedo in his well although this will take the gas away from his neighbor. *Peoples' Gas Co.* v. *Tyner*, 17 M. R. 481.

FINDINGS OF FACT.

From the bill, answer and testimony taken at the trial, we find the following facts:

1. The plaintiff is the owner in fee simple of a tract of land situate in Robinson township, this county, generally known as the W. H. Kelso Farm, bounded by lands of Tidball, Boyce heirs, Neely, Schaffer, Linton, Noble heirs, and McCurdy, and containing about 126 acres. The plaintiff has drilled six oil wells on said farm; two of these wells, known as Kelso Nos. 2 and 3, being located 251 and 204 feet, respectively, from the south line of the farm. Well No. 2 was finished and began producing oil in October, 1891; No. 3 was finished and began producing in November, 1891.

2. The Forest Oil Company is a corporation of this commonwealth, and, as a lessee, has the exclusive right to drill for oil and gas on the farm of the Boyce heirs, which farm adjoins the Kelso farm of plaintiff on the south. On this farm the defendant has completed and is now operating several oil wells,—among them, a well known as No. 1 Boyce, which is located 162 feet from the line dividing the Kelso and Boyce farms, and is 366 feet south from Kelso No. 3, and 560 feet southwest from Kelso No. 2. The well known as Boyce No. 3 is located 200 feet south from the line dividing the Kelso and Boyce farms.

3. The parties hereto have each leased numerous other farms adjoining the Boyce and Kelso farms for oil and gas purposes, and are now, and have been for some time, producing oil and gas therefrom; that the oil is now obtained from all wells in that field by pumping, the daily production of the wells being small. I further find that the sand or rock from which oil is obtained in this field, is of a loose, coarse, gravelly nature.

4. Boyce well No. 1 in the early fall of 1898 was pro-

ducing from 12 to 15 barrels of oil per day, and this production gradually fell off until December 1, 1898, when its output was 7½ barrels, and in January, 1899, it was producing less than 1 per day. In February, 1899, the well was "shot" and cleaned out, and shortly thereafter there was added to its pumping machinery and apparatus a device known as a gas pump. This device is used by oil operators for the purpose of withdrawing gas from the wells by suction, thereby increasing the well's production of oil. The distance from which these pumps will draw oil and gas depends upon the nature and quality of the oil-producing sand, its effect being felt to a much greater distance in a coarse and loose sand than in a hard and compact sand. About one week after the use of the gas pump was commenced on the Boyce No. 1 the gas supply in Kelso wells Nos. 2 and 3 of plaintiff began to fall off, and shortly afterwards the oil production of these wells was decreased. After the use of the gas pump on Boyce No. 1 was discontinued, Kelso No. 2 went back to its former production, and No. 3 is now producing daily as much as formerly, within 55-100 of a barrel and both wells now have an ample supply of gas.

5. The production of the three wells claimed to be affected by the use of the gas pump was as follows: Kelso No. 2, before use of gas pump on Boyce No. 1, 5 barrels in 6 days. Kelso No. 2, while using gas pump on Boyce No. 1, 4¼ barrels in 6 days. Kelso No. 3, before using gas pump on Boyce No. 1, 3¾ barrels in 6 days. Kelso No. 3, while using gas pump on Boyce No. 1, 2½ barrels in 6 days. Boyce No. 1, before using pump, produced a fraction less than one barrel daily. Boyce No. 2, while using pump produced a fraction more than one barrel daily.

6. The gas pump has been used in every oil field except that known as the Bradford Field, but it is not generally used except in failing and almost exhausted territory. Its use by one operator necessitates its use by others in the

immediate neighborhood, if they desire to prevent the daily production of their wells from being decreased. If pumps are placed on all wells the production of the wells is neither increased nor diminished. These pumps can be purchased either in Pittsburg, or at various points in the oil fields, and cost from $50 upwards, according to size. And the pump used on Boyce No. 1 cost $60.

7. Gas pumps were in use in the McCurdy field, the field in which the plaintiff's and defendant's wells are located, before being placed on the Boyce well No. 1, and have been in use in that field for more than one year previous thereto, and are now being used on wells in that field.

8. The farms of plaintiff and defendant, described in findings 1 and 2, lie wholly in what is known as the McCurdy Oil Field, which field was discovered in the year 1890, and has been operated since that time. The production of the wells has largely decreased, and at this time the field is almost exhausted.

CONCLUSIONS OF LAW.

The question for determination in this case is a new one. Counsel have not referred us to any case in which this question was involved; nor have we, in our examination of the case, found any. The question here is to what extent an owner of oil wells may use mechanical devices for bringing oil to the surface. In operating his own wells, may he use appliances which diminish the production of his neighbor's wells? It is not denied that a gas pump will to some extent affect the production of oil wells located in the immediate neighborhood of the well to which the pump is attached, if the sand from which the oil is obtained is of a porous, pebbly nature, as is the case in the McCurdy field. To some extent, the law governing the use of subterranean waters by the owner of the surface is applicable to the produc-

tion of oil. In regard to wells and springs, the law is well settled that the owner of land is not entitled to recover for injuries to his wells and springs caused by the acts of an adjoining owner, if the injury results from a lawful exercise of the rights of the adjoining owner, on his own property, and without malice or negligence. An owner of land may dig a well upon his property, and if, in so doing, he taps the hidden flow of water which supplies his neighbor's spring, it is a loss to the neighbor for which the law provides no remedy. *Lybe's Appeal,* 106 Pa. St. 626. In *Pennsylvania Coal Co.* v. *Sanderson,* 113 Pa. St. 145, 6 Atl. 456, it is said: "It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property. He may cut down the forest trees, clear and cultivate his land, although in so doing he may dry up the sources of his neighbors' springs, or remove the natural barriers against wind and storm. In sinking his well he may intercept and appropriate the water which supplies his neighbor's well."

In this case the defendant has the exclusive right to bore for oil on the farm of the Boyce heirs adjoining a farm owned by plaintiff. The right being a lawful one, the defendant is at liberty to use all lawful means to obtain "all the gas and oil contained in, or obtainable through, the land." *Westmoreland Gas Co.* v. *DeWitt,* 130 Pa. St. 249, 18 Atl. 725, 5 L. R. A. 732. And to that end it may resort to the use of all known lawful modern machinery and appliances. The plaintiff's claim is that the use of a gas pump in the production of oil is unlawful, because, as he alleges, by its powerful suction the oil and gas are drawn from his adjoining farm, thereby decreasing his production. Plaintiff assumes that there is a certain fixed amount of oil and gas under his farm, in which he has an absolute property. True, they belong to him while they are part of his land; but when they migrate to the lands of his neighbor, or become under his control, they belong to the neighbor. On this point, in *Brown* v.

Vandergrift, 80 Pa. St. 147, Judge Agnew, in referring to the production of petroleum, says: "Its fugitive and wandering existence within the limits of a particular tract was uncertain." And in *Westmoreland Gas Co.* v. *DeWitt, supra,* Justice Mitchell says: "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as mineral feræ naturæ. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under other's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even a distant owner drills his own land and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his."

From these cases we conclude that the property of the owner of lands in oil and gas is not absolute until it is actually within his grasp, and brought to the surface. If possession of the land is not necessarily possession of the oil and gas, is there any reason why an oil and gas operator should not be permitted to adopt any and all appliances known to the trade to make the production of his wells as large as possible? If one may lawfully use a steam pump, may he not lawfully use a gas pump? In *Ballard* v. *Tomlinson,* 29 Ch. Div. 115, it was held that a landowner has the right to all of the percolating stream under his land, the court saying: "This percolating water below the surface of the earth is therefore a common reservoir or course, to which nobody has any property, but of which everybody has the right, so far as he can, of appropriating the whole. The principle of natural use does not apply at all. The plaintiff, if he has a right to use anything in nature, has a right to exercise that use by all the skill and invention of which a man is capable; and it seems

to me that as long as the plaintiff uses only lawful means as against his neighbor, however injurious or however artificial those means may be, his right to appropriate the common source is not diminished because he uses the most artificial or most injurious methods."

If it is lawful to take water from a substrata by the "exercise of all the skill and invention of which man is capable," we see no reason why it is not lawful to produce oil by those means, especially as the possession of the soil for purposes of tillage gives the owner no actual possession of the oil and gas underlying it. The evidence shows that the gas pump has been in constant use in all fields, except one, to a greater or less extent, since the discovery of oil; that its use has been generally recognized by all operators; and that it is only used in wells in territory which is almost exhausted. Gas pumps have been used in this field for almost a year past, within 1,500 feet of the wells of both plaintiff and defendant, without objection. Their cost is within the reach of all operators, and, when used by all, none are injured. It seems to me that if it is unlawful to use a gas pump, because its use may perhaps lessen the supply of gas in the well of an adjoining owner, and thereby diminish his production of oil, for the same reason it is unlawful to use a steam pump; and, if neither gas nor steam can lawfully be used in pumping, very few wells at this day will pay drilling and operating expenses.

In view of the testimony and authorities above cited, we conclude that the use of a gas pump by defendant under the circumstances of this case, is not an unlawful act that should be restrained by injunction; that the plaintiff is not entitled to the relief prayed for; and that the bill should be dismissed.

And now, July 29, 1899, the preliminary injunction heretofore granted in this case is dissolved, and the bill dismissed, at cost of plaintiff.

A. M. BROWN and JOHN D. BROWN, for appellant.

R. W. CUMMINS and J. McF. CARPENTER, for appellee.

PER CURIAM. Though this particular question is somewhat of a novelty, the principles which control it are very familiar, and perfectly well settled. They are well expressed in the opinion of the learned court below, and, on the findings of fact and conclusions of law there contained, we affirm the decree.

WILLIAM H. BLACKBURN v. THE PORTLAND GOLD MINING CO. ET AL.

(175 U. S. 571. Supreme Court. January 8, 1900.)

[1]**The applicant for patent should be made defendant** to a suit supporting an adverse claim although he may have sold the lode and his assigns are made a party also.

The suit may be brought in any court of competent jurisdiction either state or federal, but if in a federal court the value of the matter in controversy must exceed $2,000, and there must be diverse citizenship.

[2]**No federal question involved.** A suit supporting an adverse claim is not a suit arising under the laws of the United States in such sense as to allow of it being brought in a Federal Court regardless of citizenship.

Error to the Circuit Court of the United States for the District of Colorado.

This was an action brought on August 27, 1897, in the Circuit Court of the United States for the District of Colorado, by William H. Blackburn, a citizen of the State of Colorado, against the Portland Gold Mining Company, a corporation of the State of Iowa, and W. S. Stratton, a citizen of the State of Colorado.

It was alleged in the complaint that the amount in dispute in the cause exceeded, exclusive of interest and costs, the sum of two thousand dollars; that the suit was of a civil nature at common law, and arose under the laws of the United States; that it was an adverse suit, and a suit arising under the provisions of sections 2325 and 2326, Revised Statutes of the United States, and is what is known as a suit in sup-

[1]See notes to *Nesbitt* v. *Delamar's Co.*, 19 M. R. 286.

[2]*Shoshone Co.* v. *Rutter*, 177 U. S. 505. *Mountain View Co.* v. *McFadden*, 180 U. S. 533.

port of an adverse claim; that the defendant, W. S. Stratton, had applied for a patent for a portion of the Fairplay Lode mining claim, survey lot No. 9331, under and by virtue of the provisions of section 2325, and that the plaintiff Blackburn, under and by virtue of section 2326 had filed his adverse claim and protest against the entry of said portion of said Fairplay claim, upon the ground that a part thereof was held and owned by the plaintiff as a part and parcel of the Eacho Lode mining claim; that said W. S. Stratton, on or about the 4th day of February, 1897, had made application in the United States land office at Pueblo, Colorado, for patent on said portion of said Fairplay Lode mining claim under said section 2325, and that at the time he made his said application he was not the real owner of said portion of Fairplay Lode mining claim, neither did he have any interest or title whatsoever therein; that long prior to said time the said Stratton had by good and sufficient deed conveyed all his right, title and interest in and to said claim to the Portland Gold Mining Company, defendant, and for that reason the plaintiff brought this action against the said the Portland Gold Mining Company jointly with said Stratton; that on February 1, 1897, and ever since, the plaintiff was and is the owner of and in actual possession of the Eacho Lode mining claim, 1,500 by 300 feet, situate in the Cripple Creek mining district, El Paso County, State of Colorado, and that plaintiff has the legal right to occupy and possess the same by virtue of a full compliance with the local rules and regulations of miners in said mining district and of the laws of the United States and of the State of Colorado, and by preemption, discovery and location thereof as a lode mining claim located on the public domain of the United States; that on February 4, 1897, the defendant wrongfully and unlawfully entered into and upon a parcel of said Eacho Lode Mining claim, described as follows, to wit: All that part of said claim which is intersected by the exterior lines of survey No.

9331, known as the Fairplay Lode mining claim, as shown by plat marked B, filed on July 28, 1899, in the land office of the United States at Pueblo, Colorado, with the adverse claim of plaintiff against the entry of said survey lot for patent; that the defendant has ever since wrongfully withheld possession of said parcel of Eacho Lode mining claim from the plaintiff, to his damage in the sum of one thousand dollars; that this suit is brought in support of said adverse claim within thirty days after the filing of said adverse claim, and that plaintiff has necessarily disbursed and expended the sum of one thousand dollars for plats, abstracts and copies of papers filed in said land office with said adverse claim, and also a reasonable counsel fee, to wit, two hundred dollars for the expense of preparing his said adverse claim.

The plaintiff prayed for a judgment that he is the owner and entitled to the possession of and patent to the above-described parcel of said Eacho Lode mining claim, and for the recovery of the same; for the sum of one thousand dollars damages; for the sum of three hundred dollars expended in behalf of said adverse claim, and for costs of suit.

On November 8, 1897, the defendants, The Portland Gold Mining Company and W. S. Stratton, moved the court to dismiss the cause for the following alleged reasons:

1st. That the court has no jurisdiction either of the parties or the subject-matter of said suit.

2d. That both the plaintiff and defendants in said suit are citizens of the State of Colorado, and the same is not one wholly between citizens of different States.

3d. That it does not appear in said complaint that the amount in controversy in said suit is two thousand dollars.

4th. That it appears from said complaint that said suit is one which cannot under the Constitution and statutes of the United States be brought into this court.

On December 20, 1897, the court entered judgment dismissing the cause for want of jurisdiction, and signed a bill

of exceptions at the request of the plaintiff, and also certified that the said question of jurisdiction of the Circuit Court of the United States was the only one involved in the said cause, and was the sole question upon which the said cause was dismissed, and also allowed the present writ of error.

CHARLES J. HUGHES, JR., for plaintiff in error.

W. H. BRYANT, C. S. THOMAS and H. H. LEE, for defendant in error.

Mr. Justice SHIRAS, after stating the case delivered the opinion of the Court.

As the court below filed no opinion, we are not distinctly informed upon which of the several grounds alleged the court proceeded in dismissing the cause for want of jurisdiction, and therefore it will be necessary for this court to consider each and all of them.

First, then, does the record disclose that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars? The allegation in the complaint is "that the amount in dispute in this cause exceeds, exclusive of interest and costs, the sum of two thousand dollars;" and it is also made to appear that the matter in dispute is the title to a mining claim, for which, and for damages and expenses amounting to thirteen hundred dollars, the plaintiff demands judgment. The defendants did not think fit to traverse these allegations, but moved to dismiss on the face of the complaint. Upon such a motion, as upon a demurrer, a court will not incline to dismiss for want of jurisdiction unless the facts appearing of record create a legal certainty of that conclusion. *(Barry* v. *Edmunds,* 116 U. S. 550; *Wetmore* v. *Rymer,* 169 U. S. 115.) We are not impressed by the criticism that the *amount* instead of the *matter,* in dispute,

is alleged to have exceeded two thousand dollars. The meaning of such an allegation is clear, and in the absence of any traverse thereof, and of any pretence that, in point of fact, the matter in dispute did not exceed the sum or value of two thousand dollars, we think that the record fairly imports the necessary jurisdictional amount.

The next contention, that the Circuit Court could not take jurisdiction because the record did not disclose that the controversy was between citizens of different states, seems to us to have been well founded. The complaint alleged that Stratton, one of the defendants, was a citizen of the same state as the plaintiff. Not only was Stratton named as a party defendant in the complaint, but a summons was sued out against him as such; and the motion to dismiss the complaint was made in behalf of Stratton as well as of the Portland Gold Mining Company.

It is, however, argued that, as it is alleged in the complaint that Stratton had conveyed by deed his interest in the mining claim to the Portland Gold Mining Company, Stratton was a nominal party only, whose presence on the record would not defeat the jurisdiction of the court as between the other parties; and cases are cited in which it has been held that the jurisdiction of the Federal courts will not be defeated by the mere joinder or non-joinder of formal parties. (*Wormley* v. *Wormley,* 8 Wheat. 421; *Wood* v. *Davis,* 18 How. 467; *Waldron* v. *Skinner,* 101 U. S. 577.)

But considering the nature of the suit and the relief sought thereby, we are not prepared to hold that Stratton was a purely formal and unnecessary party. It is clear, from the provisions of sections 2325 and 2326, Revised Statutes, that they contemplate a controversy between an applicant for a patent and an adverse claimant. Under the first of these sections Stratton, as the complaint shows, made personal application in the United States land office at Pueblo for a patent.

In order, therefore, that a controversy could arise under these sections, Stratton must have complied with the provisions of section 2325 by having located a piece of land and by having filed in the land office an application under oath for a patent, showing compliance, together with a plat and field notes of the claim, made by or under the direction of the United States surveyor general, showing accurately the boundaries of the claim, which shall be distinctly marked by monuments on the ground, and by having posted a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and by filing an affidavit of at least two persons that such notice has been duly posted, and by filing a copy of the notice in the land office.

It is quite evident, under these provisions and the allegations of the complaint, that, when Blackburn desired to file an adverse claim, he was informed by the proceedings in the land office that Stratton was the applicant for the patent and was asserting his compliance with the statute, and was therefore a proper and necessary party to make defendant. Why he included the Portland Gold Mining Company as a party defendant is not quite evident, but it may be conjectured that he wished to raise some question as to the validity of Stratton's proceedings in the land office after he had, as alleged, parted with his interest in the claim. However this may be, we are of the opinion that Blackburn could not proceed safely and formally to raise an issue by an adverse claim without making the person claiming the patent a party defendant when he instituted his proceedings in court.

Nevertheless, even if the Circuit Court could not take jurisdiction of the case because the controversy was not between citizens of different States, it is claimed that the court had jurisdiction because an adverse suit, or suit brought in support of a protest and adverse claim, under the provisions

of sections 2325 and 2326 of the Revised Statutes, is a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a federal court, regardless of the citizenship of the parties.

This presents an important question, one that has been differently answered in the lower courts which have been called upon to decide it. (*Burke* v. *Bunker Hill M. Co.*, 46 Fed. 644; *Trafton* v. *Nouges*, 4 Sawyer, 178; *Rutter* v. *Shoshone M. Co.*, 75 Fed. 37; *Shoshone M. Co.* v. *Rutter*, 59 U. S. App. 538.)

It may be well to quote in full the language of the sections in question:

"Sec. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor general that five hundred dollars' worth of labor has been expended, or improvements made upon the claim, by himself or grantors; that the plat is correct; with such further description by such reference to natu-

ral objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that a plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

"Sec. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries and extent of said adverse claim, and all proceedings, except the publication of notice, and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patent shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to

prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

The first observation to be made is that Congress did not intend to prescribe jurisdiction in any particular court, State or Federal. "It shall be the duty of the adverse claimant, within thirty days after filing his claim, *to commence proceedings in a court of competent jurisdiction,* to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment."

The natural inference from this language is that the competency of the adjudicating court was not to be determined by the mere fact that the mining claims in controversy consisted of lands the title to which was in the United States. If that fact alone were to be decisive no other than a Federal court would have been mentioned. We think the intention of Congress, in this legislation, was to leave open to suitors all courts competent to determine the question of the right of possession. If the parties to the controversy were citizens of different States, and if the matter in dispute exceeded the sum or value of two thousand dollars, then the claimant might elect to commence proceedings in a Federal or in a State court, because either would be competent to determine the question of the right of possession. But if the usual conditions of Federal jurisdiction did not exist, that is, if there were no adverse citizenship, and if the matter in dispute did not exceed two thousand dollars, then the party claimant could proceed in a State court.

This court has frequently been vainly asked to hold that controversies in respect to lands, one of the parties to which had derived his title directly under an act of Congress, for that reason alone presented a Federal question. Thus, in *Romie* v. *Casanova,* (91 U. S. 379), which was an action brought to recover the possession of certain lands in the city of San José, the question to be determined was, which of two

parties had actually obtained a grant of the particular premises in question. The title of the city had originated before the cession of California to the United States. But this court said: "The title of the city was not questioned. Even if it depended upon the treaty of Guadaloupe Hildalgo and the several acts of Congress to ascertain and settle private land claims in California, the case would not be different. Both parties admit that title, and their litigation extends only to the determination of the rights which they have severally acquired under it." Accordingly the writ of error to the Supreme Court of California was dismissed for want of jurisdiction.

Again, in *McStay* v. *Friedman,* (92 U. S. 723), where in ejectment for a part of the lands confirmed to the city of San Francisco by an act of Congress, the validity and operative effect of which were not questioned, this court held that it had no jurisdiction to review the judgment of the Supreme Court of California, saying: "No Federal question was involved in the decision of the Supreme Court. The city title was not drawn in question. The real controversy was as to the transfer of that title to the plaintiffs in error; and this did not depend upon the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

Gold Washing and Water Co. v. *Keyes,* (96 U. S. 199), was a suit in equity in a State court of California, and brought on petition into the Circuit Court of the United States on the allegation that its determination involved the construction of certain laws of the United States affecting rights in public and mineral lands. The Circuit Court remanded the case to the State court on the ground that no real or substantial controversy, properly within the jurisdiction of a Federal court, appeared to be involved. That judgment of the Circuit Court was affirmed by this court in an opinion

of Mr. Chief Justice Waite, a portion of which was as follows:

"The attempt to transfer this cause was made under that part of section 2 of the act of 1875, which provides for the removal of suits 'arising under the Constitution or laws of the United States.' In the language of Chief Justice Marshall, a case 'may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either.' *Cohens* v. *Virginia,* 6 Wheat. 379. Or when 'the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction.' *Osborne* v. *Bank of the United States,* 9 Wheat. 822.

* * * * * * * *

"In this petition the defendants set forth their ownership, by title derived under the laws of the United States, of certain valuable mines, that can only be worked by the hydraulic process, which necessarily requires the use of the channels of the river and its tributaries in the manner complained of; and they allege that they claim the right to this use under the provisions of certain specified acts of Congress. They also allege that the action arises under, and that its determination will necessarily involve and require the construction of the laws of the United States specifically enumerated, as well as the pre-emption laws. They state no facts to show the right they claim, or to enable the court to see whether it necessarily depends upon the construction of the statutes. . . . The statutes referred to contain many provisions; but the particular provision relied on is nowhere indicated. A cause cannot be removed from a State court simply because, in the course of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out

of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. . . . Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, in legal and logical form, such as is required in good pleading, that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States."

What is meant by the provision in section 2326, that the question of the right of possession should be determined by a court of competent jurisdiction, was thus spoken of in *Chambers* v. *Harrington,* (111 U. S. 350):

"It is apparent that the statute requires a judicial proceeding in a competent court. What is a competent court is not specifically stated, but it undoubtedly means a court of general jurisdiction, whether it be a State court or a Federal court; and, as the very essence of the trial is to determine rights by a regular procedure in such court, after the usual methods, which rights are dependent upon the laws of the United States, we see no reason why, if the amount in controversy is sufficient in a case tried in a court of the United States, or a proper case is made on a writ of error to a State court, the judgment may not be brought to this court for review, as in other similar cases."

This statement is not inconsistent with the cases herein previously cited, as the right to review the judgment of a State court is said to be limited to a proper case having been made, clearly implying that some Federal question should be involved, and that a mere controversy as to the right of possession would not make such a proper case; for otherwise

every case arising under section 2326 would be a proper case.

In *Iron Silver M. Co.* v. *Campbell,* (135 U. S. 299), Mr. Justice Miller, in discussing the scope of these sections said:

"It is true that there are no very distinctive words declaring what kind of adverse claim is required to be set up as a defense against the party making publication; but throughout the whole of these sections and the original statute from which they were transferred to the Revised Statutes, the words 'claim' and 'claimant' are used. This word is, in all legislation of Congress on the subject, used in regard to a claim not yet perfected by a title from the government by way of a patent. And the purpose of the statute seems to be that where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property, in the manner prescribed in the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the land department in determining which of these claimants shall have the patent, the final evidence of title, from the government."

The ruling in *Bushnell* v. *Crooke M. Co.,* (148 U. S. 682), is directly applicable to the present case. There a writ of error brought to this court, a judgment of the Supreme Court of the State of Colorado. The suit was in ejectment brought by the Crooke Mining Company in a State court against Bushnell, to recover possession of a certain portion of the surface location of a mining claim on Ute Mountain, and grew out of conflicting and interfering locations of mining claims. The claim of the latter was first located, but when the company applied for a patent, Bushnell filed an adverse claim to a portion of the same location, and thereafter, under section 2326 of the Revised Statutes, and within the time

prescribed therein, commenced his action in the State court. In the complaint it was alleged that the plaintiff was the owner of the Annie Lode mining claim, and that defendants had, at a certain date, entered upon and ever since wrongfully held possession of a part of said claim, specifically described, and that the action was in support of plaintiff's adverse claim to such portion of the surface location. The question presented on the trial of the controversy arose out of conflicting and interfering locations, and the court gave and refused certain requests to charge the jury, which appear at length in the report of the case in this court. The trial resulted in a verdict and judgment in favor of the plaintiff. An appeal was taken to the Supreme Court of Colorado, which affirmed the judgment of the lower court. The Supreme Court of Colorado rested its judgment upon the general proposition that the trial court had correctly stated to the jury the principal point in controversy, and had left it properly to them to determine, as a matter of fact, what was the course of the conflicting lodes. The case was then brought to this court and was heard on motion to dismiss the writ or affirm the judgment.

Mr. Justice Jackson, in sustaining the motion to dismiss, said:

"It is plainly manifest that neither the pleadings nor the instructions given and refused present any Federal question, and an examination of the opinion of the Supreme Court affirming the action of the trial court as to instructions given, as well as to its refusal to give the instructions asked by the defendants below, fails to disclose the presence of any Federal question. It does not appear from the record that any right, privilege or immunity under the Constitution or laws of the United States was specially set up or claimed by the defendant below, or that any such right was denied them, or was even passed upon by the Supreme Court of the State, nor

does it appear, from anything disclosed in the record, that the necessary effect in law of the judgment was the denial of any right claimed under the laws of the United States.

"The decision of the Supreme Court of Colorado in no way brought into question the validity or even construction of any Federal statute, and it certainly did not deny to the plaintiffs in error any right arising out of the construction of the Federal statutes. It was said by the Chief Justice, in *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S. 653: 'The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed.' "

Accordingly the writ of error to the Supreme Court of Colorado was dismissed.

The legal import of this decision plainly is that a controversy between rival claimants under sections 2325 and 2326 of the Revised Statutes may be properly determined by a State court, and that the judgment of a State Supreme Court, in such a case, cannot be reviewed by this court simply because the parties were claiming rights under the Federal statute.

Colorado Central Con. M. Co. v. *Turck,* (150 U. S. 138), was brought to this court on a writ of error to the Circuit Court of Appeals for the Eighth Circuit. An action of ejectment by Turck against the mining company for possession of a certain lode mining claim had been tried in the Circuit Court of the United States for the District of Colorado, and determined in the plaintiff's favor. The case was taken by writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, and the judgment was there affirmed, and thereupon a writ of error was allowed to this court. The case was here heard on a motion to dismiss on the ground that the suit was between citizens of different states, and that,

therefore, under the Judiciary Act of March 3, 1891, the judgment of the Circuit Court of Appeals was final. An attempt was made in argument to sustain the right of this court to take jurisdiction because, although the suit was between citizens of different States, yet that the solution of the disputed ownership depended upon the construction and application of section 2322 of the Revised Statutes, concerning the dip and apex of lodes, and that hence the suit really and substantially involved a controversy only to be determined by reference to the Federal statute. But this contention did not prevail, and the writ of error was dismissed.

While it is true that the conclusion reached was mainly put upon the ground that the record did not disclose affirmatively that any distinctive Federal question was involved, yet, as the record did disclose a controversy between claimants arising under a Federal mining statute, it is a necessary implication of the decision that that fact alone did not render the case one of which the Circuit Court could take jurisdiction irrespective of citizenship, but that other and apt allegations were required showing that the controversy was determinable by one of two conflicting constructions of the Federal statute, and not one of mere fact in which the validity of the statute was not drawn into question.

A similar principle was involved in *Gillis* v. *Stinchfield*, (159 U. S. 658). That was a suit brought in a State court of California and concerned the ownership of a mining claim. The case was brought to this court, and it was claimed that, as the question in dispute could only be determined by an application of sections 2322 and 2336 of the Revised Statutes of the United States, such a state of facts appearing by the record, there was disclosed a federal question which, of itself, gave this court jurisdiction to review the judgment of the Supreme Court of the State. But a motion to dismiss the writ of error was allowed. It is true that this court put its judgment on the ground that the judgment of the

State Supreme Court was based upon an estoppel, deemed by that court to operate against the plaintiff in error upon general principles of law, irrespective of any Federal question. Still the case is authority for the proposition that controversies in respect to titles derived under the mining laws of the United States may be legitimately determined in the State courts, and that to enable this court to review the judgment in such a case it must appear not only that the application of a Federal statute was involved, but that the controversy was determined by a construction put upon the statute adverse to the contention of one of the parties.

In *Borgmeyer* v. *Idler,* (159 U. S. 408), it was held that the mere fact that the matter in controversy in an action is a sum of money received by one of the parties as an award under the treaty of the United States with a foreign power, providing for the submission of claims against that power to arbitration, does not in any way draw in question the validity or construction of that treaty, so as to confer jurisdiction on this court to review the judgment of a Circuit Court of the United States. In this case *Gill* v. *Oliver,* (11 How. 545), was cited, in which a writ of error to the Court of Appeals of Maryland was dismissed because, although the matter in dispute was money derived under a treaty with Mexico, yet such a dispute did not involve any question as to the validity or construction of the treaty, Mr. Justice Grier saying: "Both parties claim money in court; and, in order to test the value of their respective assignments they introduce the history of the claim from its origin. The treaty and award are facts in that history. They were before the court but as facts, and not for construction. If A held land under a patent from the United States or a Spanish grant ratified by treaty, and his heirs or assignees dispute as to which have the best title under him, this does not make a case for the jurisdiction of this court under the twenty-fifth section of the judiciary act. If neither the validity nor the construction of the patent or title

under the treaty is contested, if both parties claim under it, and the contest arises from some question without or *dehors* the patent or treaty, it is plainly no case for our interference under this section. That the title originated in such a patent or treaty is a fact in the history of the case incidental to it, but the essential controversy between the parties is without and beyond it."

It should not be overlooked that sections 2325 and 2326 form a part of a general scheme in reference to the mineral lands of the United States. That scheme is contained in chapter six of the Revised Statutes of the United States, and includes sections from 2318 to 2352. Some light is thrown upon the intention of Congress, in the particular we are now considering, by other provisions than those expressed in sections 2325 and 2326.

Thus section 2319 enacts that

"all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Section 2324 provides that

"the miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim," &c.

Section 2332 enacts that where claimants

"have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be suffi-

cient to establish a right to a patent thereto, under this chapter, in the absence of any adverse claim," &c.

Section 2339 provides that

"whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same," &c.

Without undertaking to say that no case can arise under this legislation which turns upon a disputed construction, and therefore presenting a question essentially Federal in its nature, we hold that clearly where a patent is authorized to be issued to the party in possession, the statutes refer the contest to the ordinary tribunals, which are to determine the rights of the parties without any controversy as to the construction of those acts, but are to be guided by the laws, regulations and customs of the mining district in which the lands are situated. In a case, therefore, like the present, where Federal jurisdiction does not arise because the parties are citizens of different States, and where no question is made as to the meaning and construction of the statutes of the United States, the State courts are to be regarded, within the letter and meaning of section 2326, as courts of "competent jurisdiction to determine the right of possession." The judgment of the Circuit Court is therefore

Affirmed.

Mr. Justice MCKENNA dissents.

Mr. Justice BROWN did not sit in this case, and took no part in its decision.

HUGGINS ET AL. v. DALEY.

(99 Federal 606. Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

[1]**No property in oil till found. Implied covenant for diligent search.** By a course of decision in West Virginia which has established a rule of property, it is settled that an oil and gas lease in which the sole compensation to the lessor is a share of the product is not a grant of property in the oil or in the land until oil is actually produced, but merely of the right of possession for the purpose of exploration and development; and there is always an implied, if not an expressed, covenant for diligent search and operation.

Construed in favor of lessor. A different rule of construction obtains as to oil and gas leases from that applied to ordinary leases or to other mining leases, and owing to the peculiar nature of the mineral, and the danger of loss to the owner from drainage by surrounding wells, such leases are construed most strongly in favor of the lessor.

[2]**Time of essence of contract. Forfeiture.** Where an oil and gas lease by which the lessor is to be compensated solely by a share of the product contains a proviso requiring the lessee to commence and complete a well on the property within a specified time, such proviso and the time of its performance are of the essence of the contract, and it constitutes a condition precedent to the vesting of any estate in the lessee, without regard to the grammatical construction of the instrument. Where the lessee makes no attempt to comply with such provision, and evidences no intention to do so, at the expiration of the time stipulated the lease becomes forfeitable, at the option of the lessor, although by its terms it is for a definite term of years; and, being in possession, the exercise of such option is sufficiently evidenced by the lessor's execution of a new lease to another party.

No right to pay forfeit and renew. A provision in an oil and gas lease, by the terms of which the lessor is to be compensated solely by a share of the product, that, in case of the failure of the lessee to

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[1]*Parish Fork Co.* v. *Bridgewater Co.*, 51 W. V. 583; 22 M. R. —. *Florence Co.* v. *Orman*, — Colo. App. —; 73 Pac. 628. *Steelsmith* v. *Gartlan*, 19 M. R. 315.

[2]*Kelly* v. *Marshall*, 18 M. R. 317. *Waterman* v. *Banks*, 144 U. S. 394. *Snow* v. *Nelson*, 113 Fed. 353; 22 M. R. —.

A contract to sink a well to a certain depth and of a certain

comply with a condition requiring him to complete a well on the property within a stipulated time, he shall pay a forfeiture of $50, must be construed as providing a penalty intended to secure the performance of such condition, and not as an alternative condition; and where the lessee makes no attempt to fulfill the condition, and has no intention of doing so, he cannot, by a tender of the penalty, retain the lease in force until the expiration of its term, and thus secure an option on the property for speculative purposes. When, by his failure to comply with the condition, further performance of the contract becomes optional on his part, it is also optional on the part of the lessor.

Appeal from the Circuit Court of the United States for the District of West Virginia.

In Equity.

B. M. AMBLER and A. DEWEY FOLLETT, for appellants.

V. B. ARCHER, for appellee.

Before SIMONTON, Circuit Judge, and PAUL and BRAWLEY, District Judges.

BRAWLEY, District Judge. This is an appeal from the circuit court of the United States for the district of West Virginia. The appellee filed a bill in equity alleging that one A. P. Hodges had obtained from F. P. Marshall a lease for oil and gas upon a certain tract of 50 acres of land siuated in Ritchie county, W. Va., which had been assigned to him, and that subsequently said Marshall had leased the identical

diameter is not complied with where the diameter was decreased at the lower end, although for test purposes the smaller diameter was just as good as the larger. *Gillespie Tool Co.* v. *Wilson*, 123 Pa. 19.

A contract between a land owner and a gas company providing that it should cease if the company failed to pay an annual rent, does so cease only at the option of the land owner. *Hancock* v. *Diamond Co.*, — Ind. —; 70 N. E. 149.

Such a contract does not create a tenancy at will. *Id.*

premises to J. J. and J. B. Huggins; and the prayer of the bill was that the said Hugginses and their associates should be restrained in prosecuting the work for developing said leasehold for oil, and that a receiver be appointed to take possession of said leasehold premises and operate the same, and that a decree should be entered cancelling said lease as a cloud upon the title of the appellee.

Marshall was an illiterate farmer, the owner in fee of the tract of land described; and on March 12, 1897, he entered into an agreement, under seal, of which the substantial parts are as follows:

> In consideration of one dollar paid by Hodges, the lessee, the lessor "does hereby grant, demise, and let unto the said lessee all the oil and gas in and under the following described tract of land, and also said tract of land for the purpose of operating thereon for oil and gas, with the right to use water therefrom, and all rights and privileges necessary or convenient for conducting said operations and the transportation of oil and gas, and waiving all rights to claim or hold any of the property or improvements placed or erected in and upon said land by the lessee as fixtures or as part of the realty."

Then follows the description of the land. The habendum clause is as follows:

> "To have the same unto and for the use of the lessee, his executors, administrators, and assigns, for the term of five years from the date thereof, and as much longer as oil or gas is found in paying quantities thereon, not exceeding the term of thirty-five years from the date thereof; yielding and paying to the lessor the one-seventh part or share of all the oil produced and saved on the premises."

Then follows a further description of the method of delivering the oil into tanks, and a reservation of gas for the personal use of the lessor, and a proviso which is in the following terms:

> "Provided, however, that a well shall be commenced upon the

above-described premises within thirty, and completed within ninety days from the date hereof; and, in case of failure to commence and complete said well as aforesaid, the lessee shall pay to the lessor a forfeiture of $50."

This lease was not recorded until April 8, 1898. At the same time was recorded an assignment of a half interest in said lease by Hodges to Daley, dated April 2, 1897, and acknowledged on April 4, 1898, and the assignment of the remaining half interest, dated April 2, 1898, and acknowledged April 4, 1898. The lease from Marshall to J. J. and J. B. Huggins was executed November 6, 1897, and recorded January 31, 1898.

Much testimony was taken tending to show that at the time of the execution of the lease Marshall was under the impression that the lease was only for 90 days, and that he believed that the words "5 years" had been stricken from the printed form of the lease, and "90 days" written therein; and in the copy of the lease which was given to him by Hodges the words "5 years" were stricken out, and "90 days" substituted, but it appears that the substitution was not in the handwriting of Hodges. The proviso was in the handwriting of Hodges; the remainder of the lease being printed, with the exception of some interlineations. There was also testimony to the effect that Daley was a partner of Hodges, and that Hodges had taken the lease for the benefit of the Cairo Oil Company, and impeaching the bona fides of the assignment to Daley. The conclusions reached by us do not require the determination of these questions, if, indeed, they are properly before us. It is undisputed that nothing was done by Hodges toward boring the well. It is clear from the testimony that he had no intention at any time to bore the well within the 90 days stipulated, and that he had not the means to do so if he had any such intention. In November following the execution of the lease to Hodges, the appellants

leased from one Moore the land adjoining Marshall's for the purpose of operating for oil, and began to bore a well within 100 feet of Marshall's line, and about the same time they leased the land of Marshall for the purpose of operating for oil. At the time they took this lease they had knowledge that Hodges had some claim upon the land, and Marshall exhibited to them what purported to be a copy of the Hodges' lease. In this copy, as above stated, the words "5 years" had been stricken out, and "90 days" substituted; and after submitting the copy to a lawyer, and being informed that the lease had no further validity, they commenced operations upon the Marshall land, and expended about $3,600 in the boring of a well. About the time they struck pay sand, and after the well upon the Moore land was flowing oil, on April 15, 1898, Daley filed his bill for injunction. Their lease had been recorded January 31st, and some time between that day and the filing of the bill, but after they had commenced operations, Daley came upon the land, and informed them that he had some claim thereto; but the Hodges lease and assignment to Daley was not recorded until April 8th, 10 days before the filing of the bill.

The question for decision is whether the proviso in the Hodges lease constituted a condition precedent, and whether the failure of Hodges to do anything toward the boring of the well did not prevent the vesting of any rights under that lease. By the terms of that instrument the lessor granted to the lessee all the oil and gas in and under the land described, "and also the said tract of land for the purpose of operating thereon for oil and gas." By a course of decisions it is well settled in West Virginia that a lease of this character is not a grant of property in the oil or in the land, but merely a grant of possession for the purpose of searching for and procuring oil. The title is inchoate, and for the purpose of exploration only until the oil is found. If it is not found, no estate vests in the lessee; and, where the sole compensation

to the landlord is a share of what is produced, there is always an implied covenant for diligent search and operation. There is, perhaps, no other business in which prompt performance is so essential to the rights of the parties, or delays so likely to prove injurious,—no other class of contracts in which time is so much of the essence. There is no other branch of mining where greater damage is done by delay. Coal and precious metals lie either in horizontal veins or in pockets. They remain where they are until removed. Oil and gas are the most uncertain, fluctuating, volatile, and fugitive of all mining properties. They lie far below the surface, beyond the control of human will, and beyond the reach of any legal process, whence they may flow unrestrained if the owner of adjoining land bores a well down to the strata which holds them; and there is no law which can provide adequate, or indeed any, compensation for such results. This is a matter of common knowledge, and "courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction." Greenl. Ev. § 6. It furnished the ground upon which the plaintiff in this case asks the court, through a receiver, to bore the well which the lessee was required to bore within 90 days from the date of execution of the instrument under which he claims. The only consideration which moved the lessor to grant the lease was the prospective royalties from oil and gas, which could come only if the lessee complied with the terms of this proviso that required the boring of a well; for, while the sum of one dollar is technically a valuable, it is only a nominal consideration. If the contention of the plaintiff is correct, the lessee, Hodges, or his assigns, could have waited the full term of five years without expending one dollar or moving a hand for the development of the leased property, meantime tying the hands of the owner of the land, forbidding him to make arrangements with any other persons for the explorations which the lessee undertook to make, and perhaps suffering irreparable

injury from the drainage of his oil and gas. This is the contract which a court of equity is asked to enforce. It is a short view of the range of equitable principles. There are no precise technical words which distinguish conditions precedent or subsequent. Whether they are one or the other is a matter of construction, to be solved by ascertaining the intention of the party creating the estate. They are not determined merely by the structure of the instrument, or the arrangement of the covenants. Where mutual covenants go to the whole consideration on both sides, they are mutual conditions,—the one precedent to the other. 4 Kent, Comm. 144. Where the undertaking on one side is, in terms, a condition to the stipulation on the other (that is, where the contract provides for the performance of some act or the happening of some event, and the obligations of the contract are made to depend on such performance or happening), the conditions are conditions precedent. The reason and the sense of the contemplated transaction as it must have been understood by the parties, and is to be collected from the whole contract, determines whether this is so or not, or it may be determined from the nature of the acts to be done, and the order in which they must necessarily precede and follow each other in the progress of performance. But when the act of one is not necessary to the act of the other, though it would be convenient, useful, or beneficial, yet, as the want of it does not prevent performance, and the loss and inconvenience can be compensated in damages, performance of the one is not a condition precedent to performance by the other. The nonperformance on one side must go to the entire substance of the contract and to the whole consideration, so that it may safely be inferred as the intent and just construction of the contract that, if the act to be performed on the one side is not done, there is no consideration for the stipulation on the other side. *New Orleans* v. *Texas & P. Ry. Co.*, 171 U. S. 334, 18 Sup. Ct. 875, 43 L. Ed. 178.

"When one act is to be done by one party before another act, which is the consideration of it, is to be done by the other, the covenants are dependant, and the other is not bound to perform until the first act has been done, because the first act is a condition precedent to performance of the other; and, in all cases where covenants are dependant, they are in the nature of conditions precedent, and must be performed in the order of time in which performance is provided for in the covenant; and, in determining whether covenants are dependent or independent, the intention of the parties and the good sense of the case will be regarded, rather than the technical sense of the words used." Wood, Landl. & Ten. § 312.

In construing this agreement in the light of all the facts surrounding contracts of this nature, and of the considerations moving the grantor in its execution, we have no difficulty in determining that the boring of a well by the grantee was the whole consideration of the lease, that nonperformance went to the entire substance of the contract, that the word "provided" is an apt word of condition, that the grantee did not, and at the time he procured the lease did not intend to, comply with the condition which was a condition precedent to the vesting of any title in the leased lands. In cases of conditions precedent, the consideration is the performance of the thing stipulated to be done, not the promise.

But it is contended by the appellee that the clause providing a forfeit of $50 for failure to bore the well within 90 days provides full compensation for failure to perform the condition. As a matter of fact, the $50 was not paid or legally tendered; but, inasmuch as the grantor had declared a purpose not to receive the forfeit money, it will be treated as if it had been tendered. The question whether a sum of money stipulated to be paid is a penalty or liquidated damages is sometimes difficult of determination, there being no criterion of universal application. It depends upon a construction of the whole instrument, the intention of the par-

ties, the nature of the act to be performed, and the consequences which would naturally flow from its nonperformance. In many of the cases where oil leases have come before the courts, the doing of a certain thing, or the payment of rental in lieu thereof, is stipulated in the contract in a way that justifies the conclusion that the parties have provided exact and just compensation by way of liquidated damages for failure of performance in contracts, where parties stipulate in the alternative, and are free to choose. But where consequences likely to follow nonperformance are not measurable by any exact pecuniary standard, and the probable damage is out of all proportion to the amount agreed to be paid, this sum should be considered a penalty; and such we hold it to be in this case, where the sum of $50 is stated to be a forfeiture. It is in the nature of a security for the performance, and cannot be held to be liquidated damages for nonperformance."

In *French* v. *Macale,* 2 Dru. & War. 274, Lord St. Leonard thus states the doctrine which we hold to be applicable here:

"The general rule of equity is that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done."

And in *Dooley* v. *Watson,* 1 Gray, 414, Chief Justice Shaw says:

"Courts of equity have long since overruled the doctrine that a bond for the payment of money, conditioned to be void on the conveyance of land, is to be treated as a mere agreement to pay money. When the penalty appears to be intended merely as a security for the performance of the agreement, the principal object of the parties will be carried out."

If a party can show that he has done everything in his power, but, by unavoidable accident, by fraud, surprise, or

ignorance not willful, has been prevented from executing his covenant literally, the courts will relieve him, especially where the case admits of compensation for his nonperformance, or the parties can be put in the same situation as if the condition had been performed; but no ground for equitable relief can be found in a case where the party has not only failed to perform the conditions upon which alone he obtained the execution of the contract, but where it is also clear that he never at any time, intended to perform, or had the means to do so. "There is no more intrinsic sanctity in stipulations of contract than in other solemn acts of the parties, who are constantly interfered with by courts of equity upon broad principles of public policy, or the pure principles of natural justice. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different or oppressive purpose, as it would be to allow him to substitute it for the principal obligation." Story, Eq. Jur. § 1316.

The principles announced by this court in *Foster* v. *Gas Co.*, 32 C. C. A. 560, 90 Fed. 178, govern and sustain the conclusion reached, although the precise point here determined was not involved. In that case the demise was for 10 years, and there was a covenant that a well should be completed within one year, and in case of failure the lessee was to pay 10 cents per acre per annum after the time for completing the well as specified. The lessee bored one well, which proved to be dry, and no further effort was made. The court says:

"The completion of the well saves the penalty. It does not amount to a fulfillment of the covenants. The consideration for this lease was the prospective rents and royalties the lessor would enjoy if the lessee, by diligent search, could find oil and gas in paying quantities. If the lease failed to bind the lessee to diligent search for oil or gas, it was without consideration, binding on neither party, and voidable at the pleasure of either."

Numerous cases were cited,—among them, those from West Virginia which this court held to lay down rules of property stating the controlling doctrine peculiar to mining leases in that state, which the federal courts would recognize and follow. This case fully establishes the doctrine that the consideration in leases of this character "evidently and clearly contemplates active operations upon the demised premises," and when, after one failure, no further effort is made, mere inaction on the part of the lessee may well be construed an abandonment of rights under his leases. The case of *Steelsmith* v. *Gartlan,* 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107, was cited to sustain these conclusions. That was a lease to Knotts and Garber for oil purposes, providing certain royalties, with a stipulation that a well should be completed within one year; and the failure to do so rendered the lease null and void, unless the lessee should pay 25 cents per acre from and after the date stipulated for the completion of the well, when such payment should operate to extend the time for five years. No well was drilled, and lessor, considering the lease forfeited, refused to accept the rent therefor. His lessee's executor, before the expiration of five years, executed a new lease to Gartlan, February 11, 1895, which required him to drill a well within one month, with stipulations for the payment of $50 per month for any delay in completing the well. The term was for five years, and there was a stipulation that a failure to comply with any of the stipulations should render it void. Gartlan drilled a well, but, not finding oil or gas in paying quantities, removed his derrick and tools, and left the premises. The land was leased in October, 1896, to Steelsmith, who forthwith commenced operations, and filed a bill to cancel the Gartlan lease, and Knotts and Garber filed a cross bill. The court held that there being no provisions for any further operations after the first well, when completed, was nonproductive, "the contract is at an end as to both parties as soon as such first well is abandoned

as unsuccessful"; quoting *Venture Oil Co.* v. *Fretts,* 152 Pa. St. 451, 25 Atl. 732:

"A vested title cannot ordinarily be lost by abandonment in a less time than fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite a different ground. The title is inchoate, and for the purpose of exploration only until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends whenever the unsuccessful search is abandoned."

The lessee in that case had complied with the covenant to bore a well, and the court says:

"He could not be compelled to put down another well, and, he not being bound, the lessor was not bound, either; for the only consideration left to him was the prospective oil royalties and gas rentals, which the lessee was in position to entirely defeat. Contracts unperformed, optional as to one of the parties, are optional as to both."

Again:

"Such leases are construed most strictly against the lessee, and favorable to the lessor. When a lease provides the mode, manner, and character of the search to be made, implications in regard thereto are excluded thereby, as repugnant, and the demise, for the purpose of operating for oil and gas for the period of five years, is dependent on the discovery of oil and gas in the search provided for; and, if such search is unsuccessful, the demise fails therewith, as such discovery is a condition precedent to the continuance or vesting of the demise. The lessee's title, being inchoate and contingent, both as to the five-years limit and time thereafter, on the finding of oil and gas in paying quantities, did not become vested by reason of his putting down a nonproductive well."

While most of the cases cited have gone upon the ground of abandonment, the governing principle in all oil leases of the character under consideration is that the discovery and production of oil is a condition precedent to the continuance or vesting of any estate in the demised premises; that such

leases vest no present title in the lessee, and if, at any time, the lessee has the option to suspend operations, the lease is no longer binding on the lessor because of want of mutuality; and where the only consideration is prospective royalty to come from exploration and development, failure to explore and develop renders the agreement a mere nudum pactum, and works a forfeiture of the lease, for it is of the very essence of the contract that work should be done. And, the smaller the tract of land, the more imperative is the need for prompt and efficient drilling; for oil operations cumber the land, rendering it unavailable for agricultural purposes. The landowner is entitled to his royalty as promptly as it can be had. The danger of drainage from his small holding is increased by delay, and the resulting damage, not being susceptible of pecuniary measurement, is therefore not compensable. No such lease should be so construed as to enable the lessee who has paid no consideration to hold it merely for speculative purposes, without doing what he stipulated to do, and what was clearly in the contemplation of the lessor when he entered into the agreement. Leaving out the proviso which bound the lessee to diligent search and development, there is nothing in this lease which bound him to do anything whatever. The proof is clear that he never intended to drill the well within the time stipulated. This proviso was written by the lessee evidently for purposes of deception. He knew that the object of the lessor was to secure diligent search for oil, and he was "keeping the word of promise to the ear, and breaking it to the hope"; skillfully turning it into a mere speculative lease, binding the lessor and leaving himself free. It would be unconscionable to hold the lessor bound. "Law, as a science, would be unworthy of the name, if it did not, to some extent, provide the means of preventing the mischiefs of improvidence, rashness, blind confidence and credulity, on one side, and a gross violation of the principles of morals and conscience, on the other." Story Eq. Jur. § 1316.

In *Oil Co.* v. *Marbury,* 91 U. S. 593, 23 L. Ed. 328, the facts were, to some extent, the converse of those here; but Mr. Justice Miller comments on the fluctuating character and value of this class of property and asserts the injustice "of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit," and referring to the distinction between real estate, whose value is fixed, says:

"The class of property here considered is subject to the most rapid, frequent, and violent fluctuations in value of anything known as property, and requires prompt action in all who hold an option whether they will share its risks or stand clear of them, [and that] no delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably for himself whether he will abide by his bargain or rescind it is allowed in a court of equity."

In a case like this no judicial proceeding was necessary to avoid the lease. The landlord, never having been out of possession, cannot re-enter upon himself; and it was held in *Guffy* v. *Hukill,* 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, and in many other cases, that any unequivocally expressed election to avoid, as by giving a new lease, avoids the one preceding.

In *Iron Co.* v. *Trout,* 83 Va. 397, 2 S. E. 713, the court says:

"No lease of land for a rent for a return to the landlord out of the land which passes can be construed to be intended to enable the tenant merely to hold the lease for the purpose of speculation, without doing and performing in connection therewith what the lease contemplated. Such a construction would, indeed, make all such contracts a snare for the entrapment and injury of the unwary landowner. A man buying and paying for land may do with it as he likes,—work it or let it lie idle. But a tenant to whom land passes for a specified purpose has no such discretion. He must perform what he stipulated to do."

A recent author says:

"The trend of the decisions touching questions of forfeiture arising out of oil and gas leases has been almost uniformly in favor of the lessor. Generally it is the lessee who is favored, and, after a substantial compliance by him with the terms of the contract, equity will not regard a technical breach. But with mining leases it is otherwise. This is due principally to the nature of the business of mining, and more especially oil mining,—to the temptation offered a shrewd operator to purchase at a nominal price the right to develop lands, the owner of which is ignorant of their real value, and then to hold them indefinitely, neither working them himself, nor permitting another to do so." "But a lessee, where the instrument presents a semblance of inequity or unfairness, will find that he has a thorny road to travel before a court of equity will sanction his claims." Bryan, Petroleum, 146.

We are of the opinion upon the whole case, that the exploration for and development of oil and gas was the sole consideration for this lease; that the proviso requiring the boring of a well within 90 days was a condition precedent to the vesting of any interest in the lessee, and that the forfeiture of $50 was intended merely as a penalty to secure the drilling of the well, and if paid, would have been merely compensation to the landowner for the right of the lessee to possession during the 90 days, and such payment would not be so far a compliance with the conditions of the lease as to vest in the lessee a title in the leased premises for the period of five years; that after the expiration of 90 days from the date of the lease, there being no provision therein for any work to be done by the lessee in the development of the property, which was the sole consideration therefor, the lessor had the option to avoid it; that the inaction of the lessee during a period of 8 months, while operations were being commenced on adjoining land, calculated to drain the land of the lessor and irreparably injure him, fully justified his avoidance of the lease; and that the lease to Huggins and his associates was an unequivocal declaration of his intention to avoid it,

and terminated any inchoate right which Hodges could claim thereunder. The decree of the circuit court is reversed, and the case remanded, with instructions to restore the leased premises to the appellants, and that the receiver be directed to turn over to them any moneys in his hands as the result of his operations, after deducting whatever sum may have been actually and necessarily expended by him in the development of the same, and that the bill be dismissed, with costs.

GEORGE S. GAINES v. THE VIRGINIA & ALABAMA COAL CO.

(124 Alabama 394; 27 So. 477. Supreme Court. February 7, 1900.)

Effect of consolidation on pleadings. Eight separate suits were brought to which demurrers were interposed. Afterwards the suits were consolidated and a single complaint filed, a demurrer to which was overruled. In such case what the ruling was on the original demurrers becomes wholly immaterial.

[1]**Lessee to pay for coal left unmined.** Where defendant leased a mine, agreeing to pay a royalty for all coal in the seam which could be reasonably mined, and at the expiration of the lease to pay for all coal in the seam whether mined or not—on terminating the contract, in the absence of a stipulated safe mode for mining the coal, defendant was only liable for such coal remaining in the mine as could be mined by modes usually adopted in that locality with reasonable safety, and was not liable for coal rendered unmerchantable from causes which could not be prevented by prudent management.

[2]**Faults. Pillars. Waste.** In such case he is not to pay for such coal as in ordinary mining would have to be left for supports nor for such as would be lost by unavoidable waste; and, if a fault in the coal was found so as to make the mining of the coal impracticable, the lessee was not bound to mine it.

Appeal from the Circuit Court, Walker County; James J. Banks, Judge.

Action by George S. Gaines against the Virginia & Alabama Coal Company to recover on a mining lease. From a

[1]**Construction of lease requiring removal of all available coal.** *Carr* v. *Whitebreast Co.*, 88 Ia. 136; 55 N. W. 205.

Lessee held liable for failure to mine and pay royalty on minimum tonnage and the value of the coal left unmined does not recoup the damages. *Berwind-White Co.* v. *Martin*, 124 Fed. 313.

Lessee held in damages for negligent mining in so working as to render parts of the coal bed inaccessible and its coal lost to the owner. *Genet* v. *Delaware Co.*, 136 N. Y. 593; 32 N. E. 1078.

[2]*McDowell* v. *Hendrix*, 9 M. R. 96.

judgment in favor of plaintiff for part of the relief demanded, he appeals. Affirmed.

Action by George S. Gaines against the Virginia & Alabama Coal Company on contract for mining coal. There were eight separate suits to recover monthly installments accruing under the contract. These were consolidated, and the plaintiff amended his complaint, the first count of which amendment covered all of the several claims specified in the original suits. The defendant demurred separately to each of the original complaints, and also demurred to the said first count of the amended complaint. By these demurrers and also by charges requested, the defendant presented to the court for construction the contract or lease sued on. In this contract was the following stipulation: "The party of the first part (defendant) shall mine and pay for all the coal in said seam which can be reasonably mined out, and at the expiration of the lease shall pay for all the coal in said seam on said land whether the same be mined or not," at ten cents per ton. The court below held the contract to mean that the defendant was to pay only for the coal left in the land which could be reasonably mined out; and the correctness of this construction was the main question presented on this appeal. During the trial a witness was asked whether or not it was a proper mode to mine coal situate as that in question was with forks, and if so what loss would ensue. He answered that it was and the loss would be ten per cent. Further that the same coal could be mined with shovels without such loss, but it would be less marketable. To this evidence the plaintiff objected. The other facts are stated in the opinion.

NORVELL & SMITH and SMITH & WEATHERLY, for appellant.

COLEMAN & BANKHEAD, for appellee.

TYSON, J. The plaintiff, who is the appellant here, leased to the defendant a tract of 40 acres of coal-bearing land for a period of eight years for mining purposes. In this written contract of lease it was provided, in substance, that the lessee (defendant) should mine a stated minimum number of tons of coal each month, for which the lessor (plaintiff) was to be paid monthly, as royalty, 10 cents per ton, less $1 per day for 2,300 working days, which sum was to be retained by the defendant in payment of a debt due it by the plaintiff.

It was also stipulated in the written contract "that the party of the first part [defendant] shall mine and pay for all the coal in said seam which can be reasonably mined out, and at the expiration of the lease shall pay for all the coal in said seam on said land, whether the same be mined or not," at ten cents per ton. There was a further stipulation that "at the will of either party, when or after either party has violated or refused to perform any obligation imposed upon him hereby," the lease may by either party be declared terminated and annulled. Eight separate suits were brought upon the contract to recover for monthly installments of royalty for coal, which were consolidated by an order of the court.

At the term of the court at which the cause was tried an amended complaint was filed, in the first count of which each of the installments which had in the original complaints been made the subject of separate counts was included.

Demurrers were interposed to each of the original complaints as well as to the first count of the amended complaint. While the record does not show such a judgment upon the demurrers to the original complaints as can be reviewed by this court, yet, if it did, the appellant could take nothing by their being sustained, for the reason that he had the full benefit of what had been alleged in each of the separate

complaints under the first count of the amended complaint, to which a demurrer was overruled. Waiving the insufficiency in the recital of the judgment entry as showing a judgment of the court sustaining the demurrers to the second and third counts of the amended complaint, and conceding that the question of importance in the record is properly presented by the demurrers to these counts which seek to recover the 10 cents per ton for coal left unmined at the expiration of the lease, and the charges given at the request of the defendant relating to the same subject, the question thus raised involves a construction of the contract in respect to the requirement that the defendant shall, at the termination of the lease, pay 10 cents per ton for all coal left unmined on the land.

It is contended for the appellant that the appellee, under this term, is bound to pay for all coal in place on the leased land, without taking into account such as might be made unmerchantable, in the process of mining, by becoming mixed with the soil, etc., or such as might be required for supports for the roof, etc., and that no possibility of obstruction can be considered that might arise from what is known as a "fault," or "a roll," etc. The contention of the appellee is simply the reverse of each of these propositions. It contends that the words "which can reasonably be mined out" apply to and qualify the entire contract, including the term requiring the mining of all the coal on the land.

The object of all construction is to ascertain the intent of the parties, and in ascertaining this intent as respects contracts regard must be had to the subject-matter of the contract and the situation of the parties as related to that subject-matter. The plaintiff was the owner of a deposit of coal. It was valuable only as it might be dug from the earth and sold in the market, either by himself for his own account or as undertaken by others under contract with him. Whether done by himself or others, there were certain funda-

mental requirements that must always accompany the proper execution of the work. It is so in every department where human labor and exertion is a factor in the execution of an undertaking, and every contract is made with reference to the existence of such requirements. In the mining of coal, one of the hazards of the work is the danger of overhead masses falling if left unsupported, and to prevent this there must be supports of some kind to the roof. In the absence of any safe mode provided in the contract, it will be presumed that the parties intended to adopt the mode usually adopted and found safe by miners of such coal, more especially in that general locality.

Assuming that the contract here under consideration requires the mining of all the coal under the land, there must be excepted so much as would be reasonably required to support the roof, if pillars of coal is the mode usually adopted. So, also, if in getting out coal for the market, some is rendered unmerchantable by being mixed with foreign substances from causes not preventable by prudent management,—bestowing such care as a prudent owner operating his own mine, and desiring the largest yield, would bestow,—that such losses in tonnage should be deducted from the tonnage required to be mined.

In respect to what is technically termed "a roll," "a fault," and "a squeeze," where from one cause or another either the danger or cost of mining is increased, it cannot be said, as matter of law, that because of the increased danger or cost the work may be abandoned, or, on the other hand, that the contract must be construed as a contract to mine all the coal under the surface, irrespective of the danger or costs attending it. The contract must receive a reasonable construction. If the danger or cost is such that, in the first aspect, a prudent operator, having due and reasonable care for the safety and welfare of his men, would not risk the danger, and, in the other, with an incentive to take out the largest

quantity reasonably practicable, would abandon the work rather than remove or evade the obstacle with its attendant expense, the lessee in this case would not be required to incur the risk or cost.

Guided by these principles, he cannot magnify dangers or cost, so as to evade the duty of mining all that should be mined; nor, on the other hand, can he be required to assume unreasonable risks or expense wholly disproportionate to the profits that might reasonably be expected from such an undertaking. Of course, the rule is different where one undertakes to pay royalty upon a given number of tons, irrespective of whether the coal can be mined reasonably or at all. We construe the words of the contract we have quoted as applicable to the entire contract; but, even without them, there is no fixed number of tons stipulated for as the total output. The lessee, it is true, is to "mine" all on the land, but when he engaged to procure the coal,—not at all events, but by "mining" for it—it must be understood as implied that he is to mine as other persons desirous of obtaining the best results and using adequate means to achieve it perform the same kind of work. *Vincent* v. *Rogers,* 30 Ala. 471; *Grier* v. *Campbell,* 21 Ala. 327; *Holland* v. *Railroad Co.,* 91 Ala. 451, 8 South. 524, 12 L. R. A. 232. It follows from what we have said that the court did not misconstrue the contract.

There is no merit in the objections to evidence. We cannot assume "forks" could not be used in the mining required. True, the contract does not provide that they shall be used, but it may also be said it does not provide against their use. Each party had the right to have his theory of the best and most efficient mode of attaining the best results sustained by proper evidence.

The judgment of the circuit court must be affirmed.

C. C. WELCH ET AL. v. WILLIAM RENSHAW ET AL.

(14 Colorado Appeals 526; 59 Pac. 967. Court of Appeals. February 12, 1900.)

Mine worked to a loss. Plaintiffs liable. Where parties apply for a receiver to work a mine held under lease and the working results in a loss plaintiffs are liable for the deficit.

Where a receiver has no funds, the sole assets being a lease worked to a loss, judgment should go as for costs against the plaintiffs and if their associates are liable for contribution there may be judgment against them in the same case or in another action.

Items in a receiver's report not excepted to before approval cannot be attacked on the final report.

Compensation. Counsel. The court may fix a per diem to the receiver without requiring a detailed bill of his services. They may allow him counsel and fees for counsel and the compensation of both receiver and his attorney will be largely left to the discretion of the court.

Appeal from District Court, El Paso County.

Action by C. C. Welch and others against William Ren-

Long possession and solvency of defendants may defeat petition for receiver. *Kelley* v. *Boettcher*, 19 M. R. 515.

Defendant sank an oil well in good faith, believing it to be on his ground, the well being in the hands of a receiver. *Held*, that defendant should be reimbursed the cost of the sale out of the proceeds of the sale of the oil pending the litigation. *Phillips' Appeal*, 130 Pa. 572; 18 Atl. 998.

Court cannot authorize receiver to issue certificates to be a first lien against mortgage to enable him to operate the mines. *Farmers' Trust Co.* v. *Grape Creek Co.* 50 Fed. 481.

Sufficient case for receiver against coal mine. *Ulman* v. *Clark*, 75 Fed. 868.

Lessor of insolvent corporation may have receiver to protect against attaching creditors. *Kanawha Co.* v. *Ballard Co.*, 43 W. Va. 721; 29 S. E. 514.

Consideration of appointing where rights of lease shortly to expire, are involved. *Hickey* v. *Parrot Co.* 25 Mont. 164; 64 Pac. 330.

shaw, Herbert Renshaw, and Philip Whelan, receiver. From a judgment in favor of the receiver against plaintiffs, they appeal. Affirmed.

H. H. LUTHE, for appellants.

GUNNELL & HAMLIN, for appellee Whelan.

WILSON, J. Plaintiffs and defendants Renshaw were co-partners in the operation under a lease of certain mining property. The lease was in writing, and by its terms was to continue for one year from September 20, 1895, during which time the lessees were obligated to work the property continuously, and with reasonable diligence. The active operations seem to have been under the management of the Renshaws, which, proving unsatisfactory to plaintiffs, they, on June 30, 1896, commenced this suit, which had for its object the dissolution of the co-partnership and an accounting. Plaintiffs also prayed that a receiver be appointed, with power to collect all moneys due to the co-partnership, and to "conduct the business of the partnership under orders of the court, and apply all proceeds in payment of the indebtedness until the same are paid." In pursuance of the application of plaintiffs, all parties being present at the hearing, the court appointed the defendant Whelan as receiver, and in its order provided, among other things, that the said receiver should take immediate possession of the property, and "that he shall work the same, extract, mine, and ship ore to the best interest of said property, and shall pay all laborers, and all just and fair charges in relation to the treatment of said ore, and all the ordinary expenses; and the balance of the receipts from the sales of ore from said property shall be deposited, together with a statement of the total amount of receipts and the total amount of expenditures, with the clerk of this court on the 1st and 15th day of each month until said lease ex-

pires, or until further order of the court." In pursuance of this, the receiver took charge of the property, and proceeded to mine and extract ore, making bimonthly reports, as required. On September 20, 1896, the lessors declared that the lease had terminated, and filed a petition in the court, praying that the receiver be ordered to release the property to them. This was resisted by all of the lessees, including the plaintiffs herein, who filed an answer to the petition of the lessors alleging that the mining claim was being operated by them through the receiver, and was then being held by them under the terms of an oral lease entered into with the lessors, by which the lease was extended for the period of six months from September 20, 1896, and prayed that the receiver be retained in possession of the premises, and be continued under the original order appointing him, according to its terms and conditions. On October 9, 1896, the receiver tendered his resignation, and asked to be discharged, on the ground that he was unable to work the property to an advantage, there being no ore in sight with which to carry on the work. At the same time he filed in the clerk's office his final report, showing a deficit of about $1,900. To this, on the 19th of October following, the plaintiffs filed exceptions, on the sole ground, however, that the receiver had not accounted for all of the receipts with which he was properly chargeable. On the 21st of October, under a stipulation of the lessees and the lessors, the court ordered the possession of the property to be delivered by the receiver to the lessors. On the 18th of January following, a hearing was had on the exceptions to the receiver's final report. Testimony was introduced by both parties, and the exceptions were overruled by the court. On the 27th of January following, the receiver filed a motion that the court enter such judgment in the premises as would provide for and secure the payment of the claims and demands against the lease, being the claims and demands embraced in his final report, with the addition thereto of the bills for his own wages and

expenses and the expenses of $100 attorney's fees, which he claimed to have necessarily incurred in resisting the allowance of the exceptions filed to his report and in the hearing thereon. To this he attached an itemized statement of the claims for labor, giving the name of each miner, the amount due to him, and also the amounts due to various persons for supplies. Treating this as a final report, plaintiffs filed exceptions to it, in which they alleged that as to the matters and things, accounts and items, set forth in said two reports, as to whether the same were true and correct accounts, and proper to be allowed in the cause, and as to whether he had incurred said indebtedness set forth in said account, and as to whether his account and statement of his own services, and the value thereof, and accounts and statements of his expenditures in said report contained were correct and true, they did not have and could not obtain information whereupon to base a belief. They further alleged as ground of exception that said claims and demands were not properly chargeable against these plaintiffs, but only against the funds or property of which the receiver had charge. As a further ground of exception, they alleged that the receiver was not authorized or empowered, and had no legal right, to incur any indebtedness under the order of court. On February 1st following, the motion of the receiver coming on to be heard, together with the exceptions of plaintiffs, the court, after argument of counsel, and without further evidence or proofs, sustained the motion, and rendered judgment against the plaintiffs for the amount claimed by the receiver to be due.

Plaintiffs insist that the receiver had no right to incur any indebtedness whatever, and that his power with reference to the working of the property and the extraction of ore was limited by his power to pay the expenses therefrom. In answer to this it may be said that the entire property of the partnership consisted only of this leasehold estate; that by the terms of the lease it could be preserved only by continu-

ous working; that the plaintiffs themselves asked that the receiver be empowered to work the property, and mine and extract ore; and that the order of court, made at their request, expressly directed the receiver so to do. Under no principle of law or justice can they be now heard to complain of that which was done upon their motion, and at their own express request. It could not be determined whether the ore would pay the expenses of its extraction until after the expense of its extraction had already been incurred; and the plaintiffs, when they asked for an order directing the receiver to work the property, must be held to have assumed this liability. Moreover, the receiver repeatedly made reports, all of which showed that the operations were being conducted at a loss, and the record fails to show that the plaintiffs ever interposed any objection, or asked the court to modify or change its order in any respect. On the contrary, as late as September 23, 1896,—only a short time before operations finally ceased,— in answer to a petition of the lessors asking that they be given possession of the property, the plaintiffs requested the court to deny this petition, and to continue the receiver in possession under the terms and conditions of the original order.

Plaintiffs contend, however, that the court should not have rendered this judgment until the final determination of the suit for the dissolution of the co-partnership and an accounting, and that these costs should then only have been taxed against the fund. The entire fund, which was the leasehold estate, had been surrendered by the consent and at the request of plaintiffs, and was gone before the entry of this judgment in favor of the receiver; and therefore, if the contention of plaintiffs be allowed, there could have been no payment of any of these expenses incurred at their request for labor, materials, and for the compensation of the receiver. There being no assets to distribute among the partners after the surrender of the lease, it is safe to presume that neither party

would have displayed much energy or zeal in bringing the cause to a final determination. It is true that ordinarily it is the usual practice to charge the funds or estate in the receiver's hands with all costs and expenses, including compensation of receiver; but how can this be done in cases, like the one at bar, where no funds or estate exist? Must, in such case, the honest creditors be entirely defeated in their just claims? Such a doctrine is certainly repugnant to both right and reason. Where there is no fund out of which the expenses can be paid, or the fund is not sufficient, the usual rule is that the party at whose instance the receiver was appointed should be required to provide the means of payment; and it is proper to tax such costs against him in like manner as when a receiver is held to have been appointed without any probable cause for so doing. *Howe* v. *Jones,* 66 Iowa, 156, 23 N. W. 376; *Chapman* v. *Pocock,* 7 Colo. 204, 3 Pac. 219; *Cassidy* v. *Harrelson,* 1 Colo. App. 459, 29 Pac. 525; *Einstein* v. *Lewis,* 54 Ill. App. 520; *Myres* v. *Frankenthal,* 55 Ill. App. 396. If the defendant partners are properly chargeable with any portion of these expenses, that is a matter between them and plaintiffs, to be settled upon the final determination of the cause, or in some other proceeding. Neither the receiver nor his employes are concerned in it.

Plaintiffs further urge, however, that the court erred in not taking testimony upon the matters claimed to be put in issue by the exceptions which they filed in January, 1897. Whatever force there may be in this suggestion, it cannot be urged against anything unless it be the allowance of the receiver's compensation and the attorney's fees. The expenses for labor and materials had been embraced in the report of October 9th, and they were not excepted to by the plaintiffs, either as to their character, correctness, or amount. The report was, therefore, approved finally, so far as these items of indebtedness were concerned, and the court was not required to reopen this question upon exceptions subsequently filed.

As for the receiver's compensation, this was not for intricate and various duties, which would necessarily require a reference for an examination and an account. His duties were of a single and fixed character, more in the nature of those required of a mining foreman or high-class workman, and the court seems to have so regarded it by simply allowing him a per diem as his compensation. Moreover, the amount and value of miners' services in that locality appear from the reports theretofore made by the receiver, which the court could have properly considered in fixing his compensation. Again, we do not think that the loose and indefinite exceptions of plaintiffs to the receiver's accounts and expenditures were sufficient to require proof. They should be of a more specific character, so that the court, as well as the receiver, should have notice as to what claims or expenditures were objected to, and must be sustained by proof. As to the necessity of appointment of counsel and the services rendered by them, the court had personal knowledge, and no proof was required. We do not understand that the court in all cases must necessarily hear evidence as to the amount of compensation to be allowed a receiver for himself and as attorney's fees. It is a matter very largely within the discretion of the court, and, if the facts are such that the court feels at liberty to act without the assistance of such evidence, and it does not plainly appear that there has been an abuse of discretion, the action of the court will be upheld. We see no error which requires a reversal of this judgment, and it will therefore be affirmed.

Affirmed.

ON REHEARING.

PER CURIAM. We have carefully read and considered the briefs of counsel on the rehearing granted in this cause, but see no reason to change the views which we have heretofore expressed. On the contrary, we are more strongly confirmed in the conclusions which we announced in the original

opinion herein. We feel there is no doubt that, alike on reason, principle, and authority, it was not only the privilege, but the duty of the court, under the circumstances in this case, to tax the unpaid expenses of the receivership against the plaintiffs herein,—the parties at whose instance the receiver was appointed, and by whose special request he was invested with the powers and duties prescribed in the order of his appointment. Where a receiver is wrongfully appointed, this is unquestionably the rule. Beach, Rec. § 119; *Weston* v. *Watts,* 45 Hun. 219.

We see no difference in principle between such case and the one now presented. The principal portion of the debts incurred in this instance was to laborers rightfully employed by the receiver, under the terms of his appointment, for the carrying on of work which he was expressly directed to do by the request of plaintiffs. There being no fund left in the hands of the receiver to apply on the payment of these debts, and no property out of which they could be paid, it would be an anomalous condition of affairs, as well as manifestly unjust and inequitable, to say that these debts could not be taxed as costs against the party at whose instance they were incurred, and that each of these laborers should go unpaid, or should be compelled to incur the expense and delay of collecting the sum due him by independent suit against the plaintiffs. The receiver is an officer of the court, and what he rightfully does under the direction of the court is the act of the court itself. If, therefore, the contention of the plaintiffs in this case is correct, a court of equity would permit itself to be made the instrument of injustice and oppression. Such a conclusion cannot be countenanced.

As to proof of these claims, we again say, as expressly appears from the record, that the report made in October was the final report of the receiver, it being so designated and so treated, and to this there were no exceptions attacking the

validity of these debts. Even, however, if proof was required, the report of the receiver—the authorized officer of the court—was proof, and there was no attempt to overcome it by the plaintiffs.

The contention that the plaintiffs may be subjected to double litigation because of the alleged fact that each one of these laborers may bring suit against plaintiffs for his claim, is without merit. The receiver is an officer of the court, and the moneys coming into his hands are under control of the court. Therefore the court would have ample power, if plaintiffs should, under its order, pay to the receiver or into court the sums taxed against it, to compel the receiver to disburse it promptly to the proper claimants, in full satisfaction of their demands.

We also think the claim of plaintiffs that counsel fees should not have been allowed without some proof of the value of the services, and without proof that the receiver had first paid them, is not tenable. The legal services for which counsel fees were allowed were rendered in proceedings in the identical court in which all of the receivership matters were pending. The extent of the services were, therefore, known to the court; and, as to the amount of the allowance, that was within its discretion, and was a mere question as to its reasonableness.

The same may be said with reference to the compensation allowed the receiver. Neither may be said to have required any proof of value, unless there had been some services rendered of a peculiar and technical character, and not within the personal knowledge of the court. *Stuart* v: *Boulware,* 133 U. S. 78, 10 Sup. Ct. 242, 33 L. Ed. 568.

There may be some apparent conflict of authority on some of these questions, but, when the cases are examined, it will be found, we think, that the conflict is more apparent than real. It will be seen that there are varying circumstances in

each case upon which the chancellor before whom the matter was pending based his rulings, but the underlying principle was the same in all.

For these reasons we adhere to our opinion formerly announced, and the adjustment will be affirmed.

Affirmed.

GEORGE RISCH v. JESSE WISEMAN ET AL.

(36 Oregon 484; 59 Pac. 1111. Supreme Court. February 19, 1900.)

Proof of location in general terms. Where, at the time of the location of certain mining claims, notices were posted thereon, and subsequently recorded in the record of the mining district, and the claims were marked by monuments, so that the boundaries could be readily ascertained, the location was valid.

[1]**Recovery on possession alone.** The possessor of a mining claim is presumed to be the owner until the contrary appears and where the proof was that plaintiff had been in possession over 20 years he can recover without proof of transfer from the original locators.

Where ground has been held as a mining claim for 20 years it has ceased to be public domain and cannot be located by a third party.

Appeal from Circuit Court, Douglas County; J. C. Fullerton, Judge.

Action by George Risch against Jesse Wiseman and others. From a judgment for plaintiff, defendants appeal. Affirmed.

F. W. BENSON, for appellants.

A. M. CRAWFORD and WILLIAM R. WILLIS, for respondent.

[1]A purchaser must take notice of the rights of those in possession. *Coffee* v. *Emigh*, 15 Colo. 184; 25 Pac. 83.

Possession by lessee is possession by owner. *Simmons* v. *McCarthy*, 128 Cal. 455; 60 Pac. 1037.

Possession of surface is possession of vein below on the dip. *Montana Co.* v. *St. Louis Co.* 20 M. R. 507.

A surface possession prior in time is prior in right as against a subsequent underground trespass. *Lincoln Co.* v. *Hendry*, 9 New Mex. 149; 50 Pac. 330.

Building cabin, sinking shaft, etc., *held prima facie* proof of possession. *Koons* v. *Bryson*, 69 Fed. 297.

Possession must not be scrambling. Doing annual labor considered in this respect. *Hamilton* v. *South. Nev. Co.* 15 M. R. 314.

BEAN, J. This is a suit to enjoin a trespass on a placer mining claim. The facts are that, in 1869, Moses Lee, F. G. Robinson, L. F. Robinson, G. W. Robinson, O. H. Robinson, and Joshua Fawcett located seven placer mining claims on Glees creek, in Douglas county, being a claim for each, and an additional one as a discovery claim, in accordance with the local laws and customs of the mining district in which they are situated. In May, 1872, these several claims passed into the possession of the plaintiff by purchase from G. Thompson, Amos Thompson, and James Thompson, since which time he has been in possession, claiming to be the owner, and has performed, or caused to be performed, labor thereon to the amount and value, as found by the trial court, of $100 each year. In June, 1896, the defendants, claiming the ground in question to be unoccupied mineral lands of the United States, entered upon and located the same in pursuance of the laws of congress, and commenced work thereon; whereupon the plaintiff brought this suit, and, it resulting in a decree in his favor, the defendants appeal.

It is claimed that the plaintiff's possession did not prevent an entry and location by the defendants, because it was not founded upon a valid location. But the evidence shows that,

Possession must be continuous, but digging gold may constitute. *Bell* v. *Denson*, 56 Ala. 444.

Five years use of water gives title. *Smith* v. *Green*, 109 Cal. 228; 41 Pac. 1022.

Title bond gives color and mining under it is adverse possession. *Woods* v. *Montevallo Co.*, 84 Ala. 560; 5 Am. St. R. 393.

Where several enter successively under successive titles their several possessions cannot be tacked together. *Low* v. *Schaffer*, 24 Oreg. 239; 33 Pac. 678.

"Possession" as used in statute means such constructive possession as follows ownership. *Heinze* v. *Butte Co.*, 126 Fed. 1.

A mine-claimant is in possession to his boundaries, although he may not know where his boundaries are. *Molina* v. *Luce* (Ariz.); 76 Pac, 602.

For cases on possession without location, see *Hamilton* v. *Huson*, 19 M. R. 274, and notes.

at the time of the location of the several mining claims, notices were posted on each claim, and subsequently recorded in the record of the mining district; and the plaintiff testifies that the claims were marked on the ground by monuments, so that the boundaries thereof could be readily ascertained, and that Thompson, from whom he purchased, showed him the lines of the separate locations. We think, therefore, the court was clearly right in finding that the claims were located, and their boundaries marked on the ground, in accordance with law.

It is also contended that, because there is no evidence of the transfer of the title of the original locators to the plaintiff, he cannot maintain the suit. But the possessor of a mining claim in a mining district is presumed to be the owner thereof until the contrary appears, and that presumption is supported in this case by the fact that the plaintiff had held, occupied, and possessed the ground in question under color of title, in pursuance of law and the local rules and regulations of the mining district, for more than 20 years prior to the attempted location of the defendants, and therefore it was not public mineral land of the United States at the time of defendants' entry. *Gropper* v. *King,* 4 Mont. 367, 1 Pac. 755; *Cullacott* v. *Mining Co.,* 8 Colo. 179, 6 Pac. 211; *Seymour* v. *Fisher,* 16 Colo. 188, 27 Pac. 240.

The decree of the court below is therefore affirmed.

Affirmed.

PALMER, DEFENDANT; AND MOORE, PLAINTIFF.

(L. R. [1900] App. Cas. 293. Privy Council.* March 2, 1900.)

[1]**Co-lessee unable to contribute.** One of several co-lessees gave written notice that he could not contribute his share of the expenses and that he was "out of it." His associates held on to the lease, which was afterwards sold for a large sum. **Held,** that there was a complete abandonment.

The subsequent working by the co-lessee out of his own resources is an acceptance of the abandonment.

A vested legal interest may not be abandoned without acts equivalent to an agreement or license, but the disclaimer by plaintiff and the expenditure by his associates makes such an agreement as perfects the abandonment.

On appeal from the Supreme Court of New South Wales.

Appeal from a decree of the Chief Judge in Equity (Sept. 15, 1897,) which declared that Lamrock, an insolvent, had no beneficial interest in a certain gold mining lease, and was merely a trustee for the respondent of his legal interest, if any, and that the appellant, as the official assignee of his estate, had no interest in the lease and no claim to the purchase money agreed to be paid for it.

The question in the suit was whether the insolvent, as one of the holders of the said lease, had, under the circumstances stated in their Lordships' judgment, disclaimed or abandoned his interest therein. It was also contended that if such abandonment had been made that the respondent had refused to accept it.

The Chief Judge decided in favor of the abandonment.

[1]*McKay* v. *McDougall*, 25 Mont. 258; 64 Pac. 669. *Joseph* v. *Davenport*, 116 Iowa 268; 22 M. R. —.

*Present: LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

WARRINGTON, Q. C. and J. G. JOSEPH, for the appellant, contended that the legal estate in the land demised by the said gold mining lease had vested in the insolvent as one of the lessees. It remained vested in him till the date of the bankruptcy, and he continued liable up to that date to pay the stipulated rent and observe the covenants therein contained. The sequestration order made under the bankruptcy vested, by force of the local bankruptcy Act (51 Vict. No. 19), s. 10, sub-s. 1, all the bankrupt's estate and interest under the lease in the appellant as official assignee. The appellant's title rested upon this—that there had been no actual transfer made by the bankrupt. No contract had been entered into with him relieving him of his liabilities under the lease. The legal title remained, and, unless the respondent could oust it, the appellant was entitled to a share of the purchase money for which the lease had been sold. The letters in and before January, 1894, which had been put in evidence did not upon their true construction amount to a notification of abandonment of interest. Even if they did, the respondent declined to accept it, and in March endeavored to recover from the bankrupt his share of the working expenses. Nothing had happened to bind or transfer his legal interest. Even if an intention to abandon were proved, or an unequivocal representation of such intention, that would not, even if acted upon by respondent, estop the bankrupt or the appellant from claiming an interest in the land, or be sufficient to constitute him a trustee for the respondent. Nor would his failure to find his share of the working expenses operate an abandonment or work an estoppel. Nothing short of a binding transaction effective to absolve him from liabilities under the lease would suffice to oust his right, except a deed of declaration of trust. In the absence of such a deed, and having regard to the continued vesting of the legal title in the insolvent the equitable doctrine as to the effect of standing by and laches did not apply; see *Norway v. Rowe*, (1812) 19

Ves. 144, 156, 159; 12 R. R. 157; *Hart v. Clarke,* (1854) 19 Beav. 349, and see also *Senhouse v. Christian,* (1795) ibid. 356, n.; 1 R. R. 300; (1854) 6 D. M. & G. 232, 248, 253, 255; (1858) 6 H. L. C. 633; *Prendergast* v. *Turton* (1841) 1 Y. & C. 98, on appeal (1843) 13 L. J. (Ch.) 268.

SWINFEN EADY, Q. C., and C. C. SCOTT, for the respondent, contended that the Chief Judge was right in holding that the bankrupt had validly abandoned his interest. He was unable and refused to pay or contribute any share of the working expenses, or to perform any of his obligations as a co-lessee. Having failed to perform his part of the contract or joint adventure, he could not maintain any claim against the respondent in respect thereof, or claim any share in the price realized or in any other benefit which resulted from the respondent's expenditure. The letters are clear evidence that he abandoned and notified his abandonment of his interest, and that the respondent, acting on the faith of that abandonment, found money for the working expenses without resorting to him for a contribution. The authorities cited on the other side show that an interest of this kind may be abandoned. *Hart v. Clarke,* 19 Beav. 349; 6 D. M. & G. 232; 6 H. L. C. 633, especially shows that shares can be abandoned, and, if the purpose to do so is clearly shown, the legal right and title thereto are barred. Even laches on the part of the bankrupt in the continued assertion of his rights and in contribution to discharge of the joint obligations will affect his right to enforce any title which he may possess; see observations of Lord Chelmsford in 6 H. L. C. 655. With regard to the effect to be attributed to the notice of abandonment proved in this case and to the degree of acceptance required to make it effectual, see *Carlill v. Carbolic Smoke Ball Co.* (1893) 1 Q. B. 256, 262. Bainbridge on Mines, p. 196, citing the cases referred to on the other side. See also *Forster*

v. Hale (1798) 3 Ves. 696; 4 R. R. 128, and *Adair v. Shaftoe,* cited in *Norway v. Rowe,* 19 Ves. 156; 12 R. R. 157.

WARRINGTON, Q. C., replied.

The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal by the official assignee of the estate of McAusland Lamrock (bankrupt) against the decree of the Chief Judge in Equity of the Supreme Court of New South Wales, dated September 15, 1897.

The facts of the case may be shortly stated. A lease dated July 25, 1893, for the purpose of gold mining was granted by the Crown to Maguire, Lamrock and Moore (the respondent). On November 24, 1893, the Department of Mines and Agriculture served notice on the lessees to show cause why the lease should not be cancelled for non-observance of the conditions thereof. Before receiving the notice Moore had sent a notice in writing to Lamrock (which was not produced) and in reply he received a letter from Lamrock which Moore had lost or mislaid and was unable to produce at the trial. But he stated the contents of it in the following words:

"He (Lamrock) said he was unable to contribute anything towards the expenses of the mine, that I (Moore) and Maguire could do what we liked with it, and I distinctly remember the words he added, 'I am out of it.' "

The learned judge in the course of his judgment says that the respondent appeared to him to be as straightforward and honest a witness as he had ever seen, and he accepted the respondent's statement of the contents of the letter as true. Lamrock was not called by the appellant, and in these circumstances the contents of the letter are as well proved for the purposes of this suit as if the letter had been produced.

The respondent received another letter, dated January 4, 1894, from Lamrock in the following terms:

"Enclosed I forward you a notice which I have received from the warden *re* our lease. The people here will not do anything in the

matter, and I am not able to do anything, so that it will rest with you and Maguire. The only defence you can make will be that the work was done on the adjoining lease which stands in my name, and you thought such work was sufficient to meet the requirements of the conditions."

The respondent appeared before the warden and succeeded in avoiding the cancellation of the lease. Neither Maguire nor Lamrock appeared. The respondent thenceforward found all the money for working the mine. Lamrock never contributed a shilling toward it.

The result was that the respondent was in October, 1895, able to sell the mine to the trustees of a company for a considerable sum. By arrangement the purchasers retained 1200L. out of the purchase money in consequence of a claim made by the appellant (Lamrock having become bankrupt in March, 1894,) to participate in the purchase money. Maguire had previously been settled with by the respondent.

It should be mentioned that on March 5, 1894, a summons was issued by the warden at the instance of the respondent to recover 13L. for Lamrock's share of working expenses in connection with the lease from December 6, 1893, to March 3, 1894. This summons was not proceeded with in consequence of Lamrock's bankruptcy. Evidence was given by the respondent to show that the 13L. was in fact Lamrock's share of expenses up to the time of his abandonment, and the summons was inaccurately filled up by the officer of the court without his knowledge. The learned judge believed this evidence, and no reliance was placed on the issue of the summons by the appellant's counsel.

On April 22, 1897, the respondent commenced the present action against the appellant and the purchasers of the mine. By his statement of claim he alleged that Lamrock by his first letter written in December, 1893, formally disclaimed and abandoned all interest in and claim to the mine, and he claimed a declaration that at the date of the sequestration of

his estate Lamrock had no benefical interest in the lease, and was merely a trustee for the respondent of his legal interest (if any) therein, and for payment by the purchasers of the sum of 1200L. retained by them as already mentioned.

The learned judge held on the evidence before him that Lamrock had totally abandoned his interest in favor of his co-adventurers, and made an order in favor of the respondent.

Their Lordships agree with the decision of the learned judge and with the grounds upon which it was founded. It was argued before their Lordships by the learned counsel for the appellant that the equitable doctrine as to the effect of standing by and laches laid down in such cases as *Norway* v. *Rowe,* 19 Ves. 144; *Senhouse v. Christian,* 19 Beav. 356, N., and *Prendergast* v. *Turton,* 1 Y. & C. Ch. 98, had no application to a case where the claimant had an executed legal interest in the property. Their Lordships, however, do not think it necessary to resort to the equitable doctrine referred to, in the present case. It is a question of the effect of the evidence. Did Lamrock abandon all his beneficial interest in the lease, and license Moore and Maguire to continue the adventure if they thought fit to do so, at their own risk and for their own profit? In *Clarke* v. *Hart,* 6 H. L. C. 633, 656, Lord Chelmsford, commenting on the cases of *Pickard v. Sears,* (1837) 6 Ad. & E. 469-74, and *Freeman* v. *Cooke,* (1848) 2 Ex. 654, says: "So that I apprehend, where there is a vested right or interest in any party, the principle of law as now firmly established is, that he cannot waive or abandon that right except by acts which are equivalent to an agreement or to a license." Their Lordships think there was sufficient evidence of such an agreement or license in the present case. It was argued that there was no evidence of the respondent's acceptance of Lamrock's proposal. But the respondent acted on Lamrock's letter, furnished the money required for working the lease thenceforward out of his own resources, and made no claim upon Lamrock for contribution.

If the respondent had made any such claim, Lamrock would have replied with justice that he had withdrawn the respondent's authority to incur expenditure on his behalf.

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed, and the appellant will pay the costs of it.

Solicitors for appellant: ERNEST SALAMAN, FORT & Co.

Solicitors for respondent: SNOW, SNOW & FOX.

N. R. PRINCE ET AL. v. CHARLES LAMB ET AL.

(128 California 120; 60 Pac. 689. Supreme Court. March 17, 1900.)

An action upon a prospecting contract is necessarily one of equitable jurisdiction.

Such an agreement does not constitute a partnership between the parties.

[1]**Inadequate consideration.** Where the complaint alleged that plaintiff furnished defendant $50 as a grub stake with which to go from Los Angeles, California, to Alaska or the Northwest Territory, Canada, there to prospect for mines and to divide his finds with his outfitter the court will take judicial notice that such an amount is not enough to pay the expense of such a journey and refuse specific performance upon the ground of inadequacy of consideration.

Commissioner's decision. Department 2. Appeal from Superior Court, City and County of San Francisco.

Action by N. R. Prince and others against Charles Lamb and another for an accounting, and to compel specific performance of a contract. From a judgment in favor of defendant Lamb, plaintiffs appeal. Affirmed.

BROWN & NEWBY and SAWYER & BURNETT, for appellants.

HALL MCALLISTER and M. F. MICHAEL, for Charles Lamb, respondent.

[1]Agreement to convey interest in claim for slight development work, held unfair. *Bear Track Co.* v. *Clark*, 6 Ida. 196; 54 Pac. 1007.

Of contract where vendee had superior knowledge of mineral value. *Corby* v. *Drew*, 55 N. J. Eq. 387; 36 Atl. 827.

The court may decree specific performance of a contract for lease of an undivided moiety of mineral property. *Hexter* v. *Pearce*, L. R. 1 Ch. (1900) 341; 21 M. R. —. (*Price* v. *Griffith*, 13 M. R. 330, explained.)

See *Oakford* v. *Hackley*, 19 M. R. 708 and notes.

GRAY, C. This is an appeal from a judgment following an order sustaining a demurrer to the complaint without leave to amend. The action is against the defendant Lamb. Smith was made a defendant because he was out of the United States, and his consent to become a plaintiff could not be obtained.

The substance of the complaint necessary to be stated is as follows: That in the year 1896, in the city of Los Angeles, the plaintiffs and defendant Smith agreed to and did furnish said defendant Lamb with $50 ($10 each) "as a grub stake to enable him to go to Alaska, or the Northwest Territory, Canada, to prospect for gold and other precious metals, and to locate and acquire mines and mining claims;" that, in consideration thereof, Lamb agreed to go to said territory to prospect for gold and other precious metals, and that plaintiffs and said Smith should have an undivided one-half of any mines or claims located or acquired by said Lamb, together with a like one-half of all the minerals that Lamb should extract therefrom after the end of one year from the date of the contract, and after deducting therefrom the necessary expense of mining the same; and that defendant Lamb would account to and pay over to them the said one-half of said minerals. It was also alleged that it was agreed between the parties that, if Lamb should be successful in locating or acquiring any mines or claims of value, or thought to be of value, he should notify the other parties at once by letter, and as soon as possible thereafter they should go to said territory, and assist in working the same, furnishing one-half the labor and expense thereof; and said plaintiffs and said Smith were to be the owners of an undivided one-half of any mines or mining claims so located or acquired by Lamb, and were to have one-half of all the minerals thereby extracted. It is further alleged: That in pursuance of said agreement, and while the same was in full force and effect, Lamb went to said territory, and located certain mines and mining

claims, and notified the plaintiffs and Smith thereof by letter, instructing them to come and assist him in accordance with said agreement; and that as soon thereafter as possible plaintiffs Prince, Peterson, Holloway, and defendant Smith went to Dawson, Canada, and found that Lamb had disposed of some of the mines acquired by him, and refused to allow them to assist him in working the mines and mining claims he then owned, and refused to account for or pay over to them any part of the minerals extracted. That the value of the said mining claims owned by Lamb is $400,000, or more, and that after the end of one year from the date of making said agreement Lamb extracted gold from said mines and claims to the amount of $350,000 or more, and had sold certain mines and interests therein for large amounts of money; the names of such claims and the amounts received being unknown to plaintiffs. That Lamb has refused to convey to plaintiffs any part of said claims, and has refused to account to plaintiffs; and that plaintiffs and Smith have fully complied with and performed their part of the terms of said contract.

The prayer of the complainant is that Lamb be required to account for all moneys received by him for precious metals extracted as aforesaid from said mines and claims, and for the moneys received upon sales of mines and claims, and that he be required to pay over one-half so received, after deducting the amount received the first year, and the necessary expense for mining said minerals and locating and acquiring said claims; that said Lamb be required to convey to plaintiffs and to said Smith an undivided one-half interest in and to all mines and mining claims or any interest therein, which he may now own in said Northwest Territory, Canada; that said Lamb, pending suit, be restrained from disposing of any of said property, and for general relief.

From the allegations of the complaint we may properly call this an action for an accounting and to compel the spe-

cific performance of a contract. Actions of this character are, and always have been, the subjects of equitable jurisdiction only. The complaint does not warrant relief in the way of damages for a breach of the contract, because no damages are either stated or claimed. *Bohall* v. *Diller,* 41 Cal. 532; *Pittsburgh M. Co.* v. *Greenwood,* 39 Cal. 71. No relief usually granted in an action at law can be given on the complaint herein, for, without the equitable remedy of an accounting in the case, it would be impossible to determine that, after deducting the amount received the first year and the expense of mining and locating mines, there would be any portion of the $350,000 alleged to have been extracted left to divide with the plaintiffs. Hence, the action being purely equitable in its nature, to determine the sufficiency of the complaint we must measure it by those rules which prevail in courts of equity.

The appellants' chief contention is that the facts alleged disclose a special partnership agreement, and that such agreement of partnership was executed, and the partnership was actually launched, when defendant started for the Northwest Territory. If this contention were true, it might not be sufficient to entitle the plaintiffs to the relief here sought; but is it in fact true? A partnership is defined to be "the association of two or more persons for the purpose of carrying on business together, and dividing the profits." Civ. Code, § 2395. In the complaint nothing is said about the division of profits, or about any partnership, and the only allegation that can be said to refer to "carrying on business together" has relation solely to the future, and is purely executory in its nature, and does not tend to show that the "partnership was launched when defendant started for the Northwest Territory." Indeed, the complaint is singularly devoid of all those terms usually found in the definition of a partnership. *Smith* v. *Schultz,* 89 Cal. 534, 26 Pac. 1087. Nor does the language of the complaint show that a division of the profits

was contemplated by the parties. Profit is defined as "acquisition beyond expenditure," or "excess of value received over cost." By the contract alleged plaintiffs were for their $50 to be the owners of one-half of all the mines and mining claims acquired by defendant, with nothing said about deducting costs or expenditures in acquiring said mines. Of the minerals extracted after the first year, plaintiffs are to have, according to the contract, one-half, after deducting the necessary expense of mining the same. The expense to defendant of procuring these mines, added to the expense of extracting the minerals, may have been greater than the combined values of the mines and extracted minerals. If so, the plaintiffs alone would profit by the contract, and the defendant, instead of sharing in any profit, would be in arrears on the speculation. We think the contract, taken as a whole, is not one for division of profits, but rather for a moiety of property to be acquired by defendant, and therefore cannot properly be called a partnership contract under the Code definition cited above. Another reason that might be given to show that there was no partnership is found in the fact that it is not alleged that plaintiffs own any interest in any partnership property or business, or that they have ever been associated with defendant Lamb in carrying on any business. *Coward* v. *Clanton,* 122 Cal. 451, 55 Pac. 147. The mines are referred to as being owned by Lamb.

That portion of the contract relating to plaintiffs joining the defendant in working the mines and contributing to the labor and expense thereof evidently contemplated the forming of a partnership in the future, and, had the parties carried it out, it might have resulted in what is known as a mining partnership. "A mining partnership exists when two or more persons, who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same." Section 2511, Civ. Code. But, even to constitute a mining partnership,

it would seem that the parties must be associated together in the ownership or possession of the property in some way. It appears that the defendant refused to carry out or execute this agreement for working the mines together, and therefore no mining partnership was actually perfected. Of an executory contract for a partnership similar to this it has been said: "In such cases it is well settled that when the partnership was never launched, and when one of the co-partners has proceeded to conduct the enterprise in his own name, at his own cost, and for his own exclusive benefit, excluding the other party therefrom, and repudiating the partnership agreement, the only remedy of the party is an action at law for a breach of the contract. There would be, in such a case, no existing partnership, but only an agreement to form one, which was never consummated by launching the enterprise." *Powell* v. *Maguire,* 43 Cal. 11. In the case last cited the court below had ordered an accounting between the parties, and adjudged that the plaintiff be let into equal participation and enjoyment with the defendant in the franchise and business of a ferry between Vallejo and Mare Island, and the supreme court reversed the judgment and ordered the court below to dismiss the action; one of the grounds being that the contract relied on was merely executory. That the relief here sought cannot be obtained on any theory of a partnership agreement, see, also, Pom. Spec. Perf. Cont. § 290; *Hyer* v. *Traction Co.,* 168 U. S. 484, 18 Sup. Ct. 114, 366, 42 L. Ed. 547, and cases there cited.

A special partnership is not disclosed by the complaint, as none of the steps requisite under the Code to the formation of such a partnership are shown to have been taken. Civ. Code, §§ 2477-2485.

In the case of *Harris* v. *Hillegass,* 54 Cal. 465, which appellants rely on to support their complaint, it was stated in the complaint that the parties were co-partners, with equal interests, doing business in Philadelphia, and that the firm

sent Hillegass, one of its members to California, and furnished him with $1,500 to defray his traveling expenses, "and to enable him to engage in digging gold, and trading generally in said state on behalf of said firm," and that property which was procured by defendant, a share of which was sought by plaintiffs, was "acquired by and with the money aforesaid." In the case at bar there are no such allegations as the above to be found in the complaint, nor is there anything therein equivalent to or approximating such allegations.

Neither can the complaint be upheld on the theory that it counts on a grub-stake contract. It is essential to a right in property under a grub-stake contract that such property should be acquired by means of the grub-stake furnished and pursuant to the grub-stake contract. The complaint does not show that the $50 was used in procuring any portion of the property in controversy. *Emery* v. *Mason,* 75 Cal. 222, 16 Pac. 894; *Miller* v. *Butterfield,* 79 Cal. 62, 21 Pac. 543; *Berry* v. *Woodburn,* 107 Cal. 512, 40 Pac. 802; *Cisna* v. *Mallory* (C. C.) 84 Fed. 851.

The only other question discussed in the briefs is, does the complaint state a proper case for the enforcement of specific performance of the contract? "Specific performance cannot be enforced against a party to a contract in any of the following cases: (1) If he has not received an adequate consideration for the contract. (2) If it is not as to him just and reasonable." Civ. Code, § 3391. He who seeks the specific enforcement of a contract must show in his complaint that such contract is not obnoxious to the foregoing inhibition of the Civil Code. In *Agard* v. *Valencia,* 39 Cal. 292, it is said: "The court will not lend its aid to enforce a contract which is in any respect unfair, or savors of oppression, but in such cases will leave the party to his remedy at law. It is incumbent on the plaintiff, therefore, to state such facts as will enable the court to decide whether the contract is of such a character that it would not be inequitable to enforce it."

See, also, *Bruck* v. *Tucker,* 42 Cal, 346, and *Arguello* v. *Bours,* 67 Cal. 447, 8 Pac. 49. In this last case Mr. Justice McKinstry says: "In view of the intimation in *Bruck* v. *Tucker,* it will always be safer to aver (as was done in this case) that the price paid was a just and fair price, and the full value of the premises." In *Nicholson* v. *Tarpey,* 70 Cal. 608, 12 Pac. 778, it is said: "In actions for the specific performance of contracts for the sale of lands it is necessary to allege and show to the court an adequate consideration for the performance of the contract sought to be enforced, and that the same is fair and reasonable in all its parts, and of such a character as may fairly call for the interposition of a court of equity." *Morrill* v. *Everson,* 77 Cal. 114, 19 Pac. 190. In *Windsor* v. *Miner,* 124 Cal. 492, 57 Pac. 386, it is said: "Specific performance is an equitable remedy, and it is incumbent upon the plaintiff in an action of this character to show, both in the averments of his pleading and in the evidence at the trial, that he is entitled to the equitable relief which he seeks."

These principles are not restricted to contracts for the conveyance of land, but they apply in all cases where the equitable jurisdiction of the court is invoked to enforce the specific performance of any obligation. *Mississippi R. Co.* v. *Cromwell,* 91 U. S. 643, 23 L. Ed. 667. Measured by the foregoing rules, we think the court below properly exercised the discretion which it has in cases of this character in sustaining the demurrer to the complaint. For all that appeared from the complaint, the property involved in the case may have cost the defendant Lamb more than the alleged value of it. In that event it would be grossly inequitable to compel him to turn over the half of it for no greater consideration than $50.

From the facts which did appear on the face of the complaint, we think the court was also warranted in saying that the complaint showed affirmatively that the contract was

not just and fair, and that the consideration was inadequate, and that the demurrer was for that reason also properly sustained. To be sure, the expense of going to Alaska or the Northwest Territory does not appear from the complaint, but the court, we think, could take judicial cognizance that $50 was not an adequate consideration in equity to entitle plaintiffs and defendant Clark to one-half the fruits of so toilsome and expensive a journey, to say nothing about the expense of procuring the property in question after his arrival in the mining country. We could not say that the court erred in drawing this conclusion from the allegations of the complaint, even though the question of adequacy and reasonableness should, as contended by appellant, be confined in point of time to the date of the contract.

From the facts which were stated it was reasonably certain that no facts were in existence upon which the relief demanded could properly be granted, and therefore it would have been worse than useless to permit an amendment to the complaint. Furthermore, as a matter of practice, the plaintiffs cannot have a reversal of the judgment on the ground that they were not granted leave to amend, for the reason that the record fails to show any request to amend, and there is no exception to the action of the trial court in that connection for this court to act upon. *Buckley* v. *Howe,* 86 Cal. 605, 25 Pac. 132; *Durrell* v. *Dooner,* 119 Cal. 411, 51 Pac. 628.

There are other reasons that might be given why we deem the complaint insufficient, but it seems unnecessary to state them.

We advise that the judgment be affirmed.

BRITT C., and COOPER, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

HENSHAW, J., TEMPLE, J., MCFARLAND, J.

C. N. SNODGRASS v. SOUTH PENN OIL CO.

(47 West Virginia 509; 35 S. E. 820. Supreme Court of Appeals. March 24, 1900.)

[1]**Construction of no rental due.** An oil and gas lease provided that this lease shall become null and void, and all rights thereunder shall cease and determine, unless a well shall be completed on the premises within one year from the date hereof, or unless the lessee shall pay at the rate of $350 quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well, until a well is completed. **Held,** that this provision did not bind the lessee to pay any rent for the land, or for delay in commencing to operate, and that an action of assumpsit could not be maintained on such lease for failing to pay such rent, or for such delay.

Error to Circuit Court, Braxton County; W. G. Bennett, Judge.

Action by C. N. Snodgrass against the South Penn Oil Company. Judgment for defendant, and plaintiff brings error. Affirmed.

JOHN B. MORRISON, for plaintiff in error.

A. B. FLEMING and U. N. ARNETT, JR., for defendant in error.

ENGLISH, J. C. N. Snodgrass and wife entered into an agreement with the South Penn Oil Company whereby they leased to said company, for the purpose of operating for gas and oil, mining, laying pipe lines, building tanks, etc., a cer-

[1] *Brooks* v. *Kunkle*. 20 M. R. 540.

Where lessee has option to sink well or pay yearly rent he may pay the rent at any time during the year. *Blodgett* v. *Lanyon Z. Co.*, 120 Fed. 894.

tain tract of land situated partly in Gilmer and partly in Braxton counties, of 3,500 acres, more or less, with certain reservations. This tract was described in said agreement, which contained the following clause: "Provided, however, that this lease shall become null and void, and all rights thereunder shall cease and determine, unless a well shall be completed on the premises within one year from the date hereof [July 18, 1896], or unless the lessee shall pay at the rate of $350 quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well, until a well is completed." No well having been commenced or completed on said tract of land on the 1st of September, 1898, said Snodgrass brought an action of trespass on the case in assumpsit upon said agreement or lease, setting forth the terms or conditions of the lease, and, among other things, that by the writing aforesaid the defendant agreed and promised the plaintiff to complete a well on said premises within one year from the date thereof, and, in case of failure to so complete such well within one year, to pay to plaintiff a rental of $350 quarterly in advance, to wit, $350 for each three months, and to continue to do so until such well should be completed, etc., and that by the terms of said contract there was due from said defendant to the plaintiff on account of said sum to be so paid quarterly in advance the sum of $1,400, and claiming damage to the amount of $1,950. On November 28, 1898, the defendant craved oyer of the writing obligatory in the declaration mentioned, and filed a general demurrer to the plaintiff's declaration, in which demurrer the plaintiff joined. Subsequently, the plaintiff was permitted to amend his declaration by writing the following words therein: "And did not surrender or offer to surrender the said lease to the plaintiff for cancellation, but still holds and retains the same." The court, having fully considered the demurrer of the defendant to the declaration of the plaintiff, sustained the

same, and dismissed the plaintiff's action with costs, and from this judgment the plaintiff obtained this writ of error.

It is claimed that the court erred in sustaining said demurrer and dismissing said action. By craving oyer of the obligation sued on, the same was made a part of the declaration, and the question raised and presented for consideration by the demurrer is whether the agreement upon which this action is predicated contains any contract or promise, either express or implied, for the payment of money by the defendant to the plaintiff. Although the agreement contains the provision above quoted, yet that clause merely provides a means by which a forfeiture of the lease may be avoided. The agreement contains no contract or promise to pay anything whatever for the delay in the completion of a well, and yet the declaration claims that, by the terms of the contract, there is due from the defendant to the plaintiff on account of the sums to be paid quarterly in advance, the sum of $1,400. The question in this case is not whether the defendant has forfeited the lease, but whether it is pecuniarily liable to the plaintiff for failing to make certain payments to the plaintiff whereby such forfeiture could have been avoided. Counsel for the plaintiff relies on the case of *Roberts* v. *Bettman,* 45 W. Va. 143, 30 S. E. 95, but that case was materially different from this. There the lease sued on contained the following clause: "It is agreed that the party of the second part shall pay to the party of the first part $100 per month, in advance, until a well is completed, from the date of this lease, and a failure to complete such well or to pay said rental when due or within ten days thereafter shall render this lease null and void," etc. There was an express promise to pay $100 per month in advance until a well was completed, but in the agreement sued on in the case under consideration there was no such promise or contract. Counsel for plaintiff in error claims that the lease continued unless it had been surrendered by the defendant, but, even if that

be true, it would work no benefit to the plaintiff in error, for the reason that there was no contract on the defendant's part to pay anything as rent or compensation for delay in commencing operations. In the case of *Glasgow* v. *Oil Co.*, 152 Pa. St. 48, 25 Atl. 232,—an action of assumpsit to recover rent or royalties on an oil lease,—the lease sued on contained this proviso: "Provided, however, that this lease shall become null and void, and all rights hereunder shall cease and determine, unless a well shall be completed on the premises within one month from the date hereof, or unless the lessee shall pay at the rate of one hundred dollars monthly in advance for each additional month." It was held that the lease contained no covenant on the part of the lessee to pay rent or develop the land. The only penalty imposed on him for failure to operate the land or pay $100 per month for delay was a forfeiture of his rights under the agreement. The agreement in that case appears to have been almost identical with that in the case we are considering. The construction placed upon said clause in the agreement, and the conclusion reached by the Pennsylvania court as to the consequences resulting from a failure to pay the $100 monthly in advance, seem to be reasonable and right, and they accord with my views on the proper construction of the agreement declared on in the case at bar. In the absence of any contract or promise on the part of the defendant to pay rent for failure to commence operations, I conclude that, under this agreement, the only consequence that would result from such failure would be a forfeiture of the lease, and that the court committed no error in sustaining the demurrer to the plaintiff's declaration.

Affirmed.

A. W. KNOTTS ET AL. v. MATILDA MCGREGOR.

(47 West Virginia 566; 35 S. E. 899. Supreme Court of Appeals. March 24, 1900.)

An action can be maintained against an executor for breach of covenant of a lease committed by his testator.

Implied covenant. In a lease for oil and gas there is an implied covenant of right of entry and quiet enjoyment for the purposes of the lease.

Second lease on same premises. The covenant of quiet enjoyment in a lease for oil or gas, or other purposes, is not broken by the mere fact, alone, that the lessor makes another lease during the term, of the same premises, whether the first lessee be in actual possession or not; the second lessee not entering.

Excluded lessee. The covenant for quiet enjoyment implied in a lease for oil is broken by the exclusion by the lessor of the lessee from taking possession for the purposes of the lease, or his withholding from him the possession of the land for the purposes of the lease.

Misjoinder. A cause of action against a decedent's estate cannot be joined in the same action with a cause of action against the personal representative individually.

Practice in such case. A misjoinder of causes of action in a declaration is fatal on demurrer, dismissing the action, unless the plaintiff, as he may, amends by striking out one or more counts, or, if two causes of action or two assignments of breaches of contract are in the same count, by electing to proceed only on certain causes of action or assignments.

(Syllabus by the Court.)

A reference in a second lease, to a prior lease construed as notice of the outstanding lease, with the privilege to lessee at his own risk to contest the same. *Aye* v. *Philadelphia Co.* 20 M. R. 177.

Sale by the lessor without reserve of the lessee's rights is a constructive eviction. A surface entry by the lessor and constructing a building not interfering with lessee's operations is not an eviction. *Mathews* v. *People's N. Gas Co.*, 18 M. R. 552.

Defendant leased in writing to plaintiff coal at one point and afterwards contracted verbally to give him a lease at another point: *Held*, two separate agreements and not a change of the original writing by parol. *Heilman* v. *Weinman*, 139 Pa. 143; 21 Atl. 29.

New lease for longer or shorter term determines the first. Rela-

Error to Circuit Court, Ritchie County; Romeo H. Freer, Judge.

Action by Knotts & Garber against Matilda McGregor. Judgment for defendant, and plaintiffs bring error. Affirmed.

V. B. ARCHER, for plaintiffs in error.

B. F. AYERS and W. McG. HALL, for defendant in error.

BRANNON, J. A. W. Knotts and J. Garber brought an action of covenant against Matilda McGregor, executrix of the will of David McGregor, deceased, in the circuit court of Ritchie county, which action was dismissed upon a demurrer to the declaration, and the plaintiffs have brought the case to this court. The declaration avers: That David McGregor made a lease August 30, 1889, to Knotts & Garber, of certain land, for the purpose and with the exclusive right of operating for the development of petroleum oil and gas for the term of five years; said lessees covenanting to pay McGregor an eighth of the oil produced, and $200 per annum, for each productive gas well, and that said lessees should complete a

tion of holder of bond and lease to title after purchase. *Wade* v. *South Penn Co.*, 19 M. R. 605.

An oil lease was let under which default was made; a second lease was then let; the second lessee did not enter; the first lessee returned and struck a paying well; case held in favor of the first lessee. *Thomas* v. *Hukill*, 34 W. Va. 385; 12 S. E. 522.

A second lease while the first is alive by payment of the rent is void. *Friend* v. *Mallory*. 52 W. Va. 53; 43 S. E. 114.

The delivering of a second lease is not necessarily a declaration of forfeiture of a prior lease. *Henne* v. *South Penn Co.* 52 W. Va. 192; 43 S. E. 147.

Where a party lets a second oil lease the first lessee cannot claim the royalty payable by the second lease. *Eclipse Co.* v. *Garner*, 53 W. Va. 151; 22 M. R. —.

well within one year from the date of the lease, and a failure to do so should render the lease null and void. But it was further covenanted that, if the lessees should pay McGregor a rental of 25 cents per acre from the time specified for the completion of the well, such payment should operate to extend the time for five years, and that said rental should be deposited to McGregor's credit in the Second National Bank of Parkersburg. That said lease provided that all the conditions thereof should extend to the heirs, executors, and administrators of the parties. The declaration further avers that the plaintiffs had well and truly kept and performed their part of the said lease; that on August 30, 1890, they tendered McGregor $125 for the rental provided in said lease, but he refused to accept the same, and that on August 29, 1891, the plaintiffs deposited the same to McGregor's credit in said bank, and that McGregor had accepted such deposit and used part of it in his lifetime, and his executrix had accepted and used the residue thereof; that, the plaintiffs having kept their covenants, the said McGregor did not in his lifetime keep his, and that the plaintiffs did not during the term of said lease have and enjoy the exclusive right to drill and operate for oil and gas on the premises demised; that after the making of said lease, and during the term therein granted, David McGregor executed another lease, February 13, 1890, to A. L. Gracey, for the same land, with the exclusive right to operate for oil and gas thereon for the term of 20 years from the date of said lease,—requiring said Gracey to complete a well within nine months, or forfeit the lease, with right, however, to keep the lease alive by the payment of $25 per month rental. The declaration further avers that David McGregor died during the term so demised to the plaintiffs, and that Matilda McGregor was appointed by his will its executrix, and qualified as such. The declaration further avers that, before the expiration of the one year specified in said lease in which said plaintiffs were entitled to enter

upon the leased premises to operate for oil, McGregor did prevent and exclude them from their right so to enter upon said premises, and continued so to exclude them up to his death, September 7, 1891, and prevented them from entering upon said premises for the purposes of putting down the test well or developing said premises for oil within the first year mentioned in said lease, and also within the 5-year period therein mentioned, and that the plaintiffs were kept and held out of the exclusive enjoyment of the right to operate upon said premises for oil from the 30th of August, 1889, until the death of said McGregor, and thereby the plaintiffs lost the benefit of the demised premises, and gains and profits which they would have made from said lease, and the value of said lease, and had thus been damaged $150,000. The declaration contains a second count, stating over again the same lease from David McGregor to the plaintiffs, and the subsequent lease by him to Gracey, and alleging the denial to the plaintiffs of the benefit of their said lease, and their exclusion from the premises by McGregor in his lifetime, in like manner as stated in the first count. This second count further averred that after the death of David McGregor his said executrix entered into and held said land as such executrix, and that on February 10, 1895, she executed to James Gartland a lease for the purpose of the production of oil and gas for the period of 5 years, covering 125 acres of the same land which had been leased by David McGregor to the plaintiffs; that the said Matilda McGregor, executrix, did cause said Gartland to enter and take possession of said 125 acres, and that he did by virtue of his lease enter into said premises, and exclude the plaintiffs from the said 125 acres, within the period of their lease; and that said executrix did cause and permit Gartland to operate for oil on said land, and to put down a well thereon, and thereby did exclude the plaintiffs from the possession of said premises, and thus did disturb and molest the plain-

tiffs, and deprive them of the benefit, enjoyment, and profits of their said lease.

It is contended that no action at law lies for a breach of the covenant of the plaintiff's lease by David McGregor, in his lifetime, against his personal representative. For this position we are referred to Code c. 86, § 6, providing that an heir or devisee may be sued in equity by any creditor to whom a debt is due, for which the estate descended or devised is liable, or for which the heir or devisee is liable, in respect to such estate, and he shall not be liable to an action at law therefor. We are also cited for the proposition to *Rex* v. *Creel,* 22 W. Va. 373. That statute has no bearing on this case. It does not bear on the liability of the personal estate. Formerly the land of a decedent, in the hands of his heirs, was liable only for debts of record, and bonds or other instruments under seal, expressly binding the heirs. For such debts the heir could be sued at law, and the debts levied out of land descended to him. Such a debt bound the land, but the land was not bound for any other debts at law, though it was in equity. The specialty creditor getting a judgment against the heir had preference over other creditors. The legislature thought it unjust that a dead man's land should be liable only for part of his debts, and concluded to make it liable for all his debts, whether by bond or otherwise. This statute is found in Code c. 86, § 3. Having thus made the decedent's real estate liable for all his debts and demands, it was thought best to prohibit different and multitudinous suits at law against the different heirs, entailing large costs, and to compel the creditors to resort only to equity, where the land assets could be administered for the benefit of all creditors, and the debts marshaled, and all paid, according to the principle on which courts of equity, before that statute, marshaled equitable assets. It is apparent that the legislature did not intend to abolish the long

standing remedy of a creditor to sue a personal representative to have his demand satisfied out of personal assets. Section 19 of Chapter 85 of the Code expressly provides that "a personal representative may sue or be sued upon any judgment for or against, or any contract of, or with his decedent." This section only declares what the law was before it, and surely meets and defeats the contention that section 6 of chapter 86 does not allow a suit against the personal representative. 2 Lomax, Dig. p. 116 § 13. Of course, as we see daily, actions at law can be brought against personal representatives on bonds and notes of the decedent under section 19, c. 85; but actions at law could not now be brought on a bond against the heir, as formerly, because section 6, c. 86, would prohibit it. If it be thought that an action for breach of covenant contained in a deed of lease for years or in fee simple cannot be maintained against a personal representative, the position cannot be maintained. It is a contract under the wide language of section 19, c. 85. "An action of covenant respecting real estate will lie against executors, though not expressly bound." *Harrison* v. *Sampson,* 2 Wash. (Va.) 155. A covenant of warranty of title is a personal covenant, upon which an action of covenant lies on eviction against the personal representative. *Tabb's Adm'r* v. *Binford,* 4 Leigh. 132. An action at law against a personal representative of a decedent, to secure satisfaction out of his personal assets, may be sustained, under section 19, c. 85, Code, on any personal promise, covenant, or obligation, —any contract. I did not suppose there was any question about this. The creditor, if he thinks there is any question about securing satisfaction out of the personal assets in the hands of the personal representative may, without first suing at law, go into equity, under Code, c. 86, § 6. As a judgment at law is no evidence whatever of indebtedness against the heir,—I mean, a judgment against the personal repre-

sentative,—if there is any doubt of the sufficiency of the personal assets to pay debts resort had better be had at once to equity.

Does the plaintiffs' declaration show a cause of action to charge the estate of David McGregor with damages as for the breach of the covenant contained in the deed of lease? Every lease for years, though it does not expressly covenant for quiet enjoyment of the premises by the lessee, implies and imports such covenant; that is, that he shall enter and enjoy the premises for the term without the permission of any one. Wood, Landl. & Ten. 562; Tayl. Landl. & Ten. § 304. Does the declaration show a breach of such covenant?

First, does the first assignment of breach in count 1, namely, the execution by McGregor of the second lease to Gracey, *per se* and alone, operate as a breach of the covenant? Counsel for the plaintiffs cite 11 Am. & Eng. Enc. Law (2d Ed.) p. 469, reading, "A tenant is evicted where, before the expiration of his lease, the landlord rents the demised premises to another person, who takes possession of them without the tenant's consent." That is sound law, as the law found in that great work almost invariably is; but note that it does not assert the proposition asserted in the declaration (that is, that the mere execution of a second lease alone is eviction), but it requires, in addition, the taking of possession of the premises by the second lessee, which is necessarily an exclusion of the first lessee. In order to constitute a breach of warranty in the case of landlord and tenant, there must be an actual eviction from the premises. 1 Tayl. Landl. & Ten. §§ 377, 378, 381. "An actual eviction is an actual expulsion of the tenant out of all or some part of the demised premises, —a physical ouster or dispossession from the very thing granted, or some substantial part thereof." 11 Am. & Eng. Enc. Law (2d Ed.) p. 459; 2 Minor, Inst. 757; *Briggs* v. *Hall,* 4 Leigh. 484. In this case the declaration does not predicate the cause of action upon the theory that the plain-

tiffs were once in possession,and were expelled by McGregor or by Gracey; but I give the authorities just quoted to show what must be the character of act constituting eviction, to reflect light by assimilation on this case. Further, that second lease, so far as the declaration shows, did not constitute paramount title. If at the time a conveyance with general warranty is made the land is actually in the possession of a third party, holding the same under paramount title, this amounts to an eviction *eo instanti*. Before an action will lie for a breach of covenant of general warranty, there must be an ouster under paramount title, but it may be established by showing that at the time the covenant was made a third person was in possession of the land under paramount title. *Rex* v. *Creel*, 22 W. Va. 373. But that second lease does not appear to constitute paramount title, as far as the declaration goes; and, if it did, there is no pretense that Gracey took possession under it. In fact, the declaration says he did not. The most that can be said, therefore, is, so far as this second lease operates, that McGregor failed to deliver possession, and it seems that that is not eviction, or tantamount thereto; and while, under the circumstances, the failure of the owner to deliver possession to a lessee might be the basis of an action, if he refused on request, it is not eviction. 11 Am. & Eng. Enc. Law (2d Ed.) 460. Thus, the mere making of that second lease constitutes no ground of action.

Next, as to the other breach assigned in count No. 1. That is that David McGregor denied the plaintiffs the right to enter upon the premises to operate for oil, and did exclude them from so doing. When one makes a lease to another, he impliedly covenants that the lessee shall enter into the possession, and quietly enjoy that possession. It implies that the demised premises shall be open to entry by the lessee at the time fixed for taking possession. *King* v. *Reynolds*, 42 Am. Rep. 107. Reason and justice say that, if the lessor refuse to admit the lessee into possession,—if he

withhold possession from him,—he violates his covenant. Authority sustains this position. 11 Am. & Eng. Enc. Law (2d. Ed.) 467; 1 Tayl. Landl. & Ten. § 306; *Hubble* v. *Cole* (Va.) 13 S. E. 441; 13 L. R. A. 311. Now, the only question perplexing me in this particular case is whether the declaration is too general in its charge of the exclusion of the plaintiffs by McGregor from the premises. It does not say how or by what means he excluded them. It does not say that they requested delivery of possession, but they need not request, as the lease gave them right to possession. The declaration does not, in terms, say that the plaintiffs went to take possession; but in effect it does so, by charging that McGregor denied their right to possession, and excluded them from going on the premises to bore the test well. A declaration need not give items of evidence,—mere evidential facts going to show the ultimate fact constituting the gravamen of action. It need only give the facts that constitute the cause of action to be shown by the evidence. I conclude that the declaration is sufficient in this respect.

But there is another grave objection to the declaration, for which we must sustain the decision of the circuit court. In the same action the plaintiffs join two separate causes of action,—one against the executrix for breach of covenant by the testator in his lifetime, and the other for a breach by the executrix after his death. Of course, McGregor's estate cannot be liable for the act of the executrix in making the lease to Gartland, for three reasons: (1) Because, as shown above as to the Gracey lease, a mere second lease would not be a breach of the covenant; (2) because that lease was made after McGregor's death; (3) because it is to be presumed that the land descended to the heirs, and that the executrix had nothing to do with it under the will, it not being so averred. And, as to the averment that the executrix excluded the plaintiffs from the enjoyment of the lease to them, the estate is not liable, for two reasons: (1) Because it is not shown that

she had any lawful authority over the land; (2) because, if she did wrong in refusing the plaintiffs possession under the lease made by her testator, it would be her own wrong, for which she would be personally liable. "In causes of action wholly accruing after the decedent's death, the personal representative is, in general, liable individually." Schouler, Ex'rs, § 397; Lomax, Ex'rs, 262 §§ 14, 283. In this action there is a misjoinder of causes of action. For the cause of action originating from David McGregor's act in his lifetime, his estate would be liable. For those of Matilda McGregor, she would be individually liable. The one recovery would be payable out of assets; the other, out of her own individual property. "Claims as executor cannot be joined with those accruing by private right, for the judgment against a party in his personal capacity is *de bonis propriis,* while against him as executor or administrator it is *de bonis testatoris.*" 1 Bart. Law Prac. 304; 1 Enc. Pl. & Prac. 177. At page 163 the latter valuable work has an excellent discussion of joinder of causes of action. At common law an improper joinder in the same declaration of different causes of action was fatal on demurrer, working the dismissal of the action. It is still so on demurrer. Code, c. 125, § 29, does not save such a declaration on demurrer. Prof. Minor says that, if there be no demurrer, the defect does not avail to arrest judgment, by reason of section 3, c. 134, Code. No doubt that in the trial court a party may amend his declaration by electing which cause of action he will proceed upon, or by striking out particular counts, if the causes of action are stated in different counts. Where, as in the second count of this case, two causes are joined in one count, the party could cure by electing to proceed on a particular cause, but in this case the plaintiffs declined to amend. See 1 Chit. Pl. 228; 4 Minor, Inst. 448; *Creel* v. *Brown,* 1 Rob. 265.

The point is made that *Trees* v. *Oil Co.* (W. Va.; decided

November 28, 1899) 34 S. E. 983, holds that an executory oil lease is terminated by the death of the lessor. Surely this court did not mean to hold, and did not hold, that broad proposition. Under the peculiar feature of the lease in that case, as put in the first point of the syllabus,—not binding the lessee to carry out its covenants, but giving him right to defeat the same at any time without payment of anything,—that lease was held to be a lease, or option for a lease, at will, determinable by either party any time, as it created no vested estate. The lessee did nothing, and paid nothing. But in this case the lease does not contain that express clause of complete exemption from liability; and, moreover, under its terms the lessee tendered the rental within time, and on refusal paid it into bank to McGregor's credit, and he accepted it, as the declaration alleges. This is a different case from that. Therefore we affirm the judgment, without prejudice to any other proceeding in law or equity.

Affirmed.

EMPIRE MILLING & MINING CO. v. TOMBSTONE MILL & MINING CO.

(100 Federal 910. U. S. Circuit Court, District of Connecticut. March 29, 1900.)

Valid state regulation of foreign corporations. A territorial statute requiring foreign corporations, before carrying on business within the territory, to file copies of their articles of incorporation, and appoint an agent on whom process may be served therein, imposes reasonable requirements as a condition precedent to the right to do business in the territory, and is valid.

A single contract made by a corporation owning mining ground in a territory, by which it employs and agrees to pay a second party to exploit and develop the property, does not constitute a carrying on of business in the territory by the corporation, within the meaning of a statute requiring foreign corporations carrying on business within the territory to file copies of their articles of incorporation, and providing that every act done by them prior to the filing thereof shall be void; and such statute does not affect the validity of the contract.

[1]**May follow vein on dip beyond end lines.** Under the rule that where a lode mining claim is located across, instead of along, the vein, the original side lines become end lines, and the end lines side lines, the owner is entitled to all the rights with reference to the new side lines that he would have had if they had originally been located as such, including the right to follow the dip of a vein having its apex within the surface boundaries of his claim, beyond the vertical plane passing through such end lines.

Working contract between adjoining mines, no estoppel as to title. Defendant, the owner of a mine, contracted with plaintiff, which owned an adjoining claim, to extend its workings into such claim, for a stipulated price, for the purpose of exploiting and developing the property, and agreed that, should any marketable ore be taken therefrom in the course of such development, it would sell the same, and account to plaintiff for the proceeds. **Held,** that defendant was not estopped by such contract from claiming the proceeds of ore so removed and sold as its own, where, in making the development, it discovered that the vein from which it took such ore had

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[1] 2 Lindley, 2nd Ed., § 589. Snyder on mines, §§ 445, 828. The text opinion was followed on the final trial of the case, July, 1904, awarding damages to the plaintiff as reported in 131 Fed. 339.

its apex within the lines of its own claim, and the ore was, therefore, its own property.

On demurrer to Answer.

GROSS, HYDE & SHIPMAN and L. P. WALDO MARVIN, for plaintiff.

WM. P. WILLIAMS and S. C. DUNHAM, for defendant.

TOWNSEND, District Judge. Demurrers to answer in an action at law. The complaint is in four counts. The causes of action therein alleged arise out of a contract executed by the parties which is as follows:

"Articles of agreement made this 18th day of January, A. D. 1894, between the Tombstone Mill & Mining Company of Connecticut by its general manager, W. J. Cheyney, party of the first part and the Empire Milling & Mining Company of Maine, by its president, party of the second part.

"First. That said party of the first part, having opened up its mine to within a few feet of the dividing line between the properties of the two companies, affording an opportunity to exploit and develop the Empire mine, the property of the party of the second part, at a cost of much less, and in a shorter space of time, than possible to be done through its own shaft, or by any other method now known to the party of the second part, and the party of the second part being desirous that the said exploiting and developing be done to the extent possible under an expenditure of ten thousand dollars ($10,000), the said party of the first part hereby agrees to undertake the said work for and on behalf of the party of the second part, and binds itself to prospect and develop the said Empire mine, using its best knowledge, skill, and care, doing all the said work as thoroughly, perfectly, and economically as if the said work were being done on its own property, to report the result of its work as progress is made, and to complete said work by or before the first day of March, A. D., 1895; the said party of the second part to have all reasonable facilities afforded it for entering the property and inspecting the work, all for the consideration hereinafter named.

"Second. The party of the second part hereby agrees that the party of the first part shall have the right to repair and use the Empire shaft at its discretion, and it hereby agrees and binds itself to pay to the party of the first part such sums of money as may be called for from time to time, the aggregate not to exceed the sum of ten thousand dollars ($10,000).

"Third. Should any marketable ore be extracted in the course of the aforesaid developments, it is hereby agreed that the said party of the first part shall sell the same on the same basis as it sells its own ores, accounting to the party of the second part therefor; and, in consideration of the covenants and agreements hereof it is mutually agreed that the party of the first part shall be allotted and paid such equitable portion of the proceeds of sale of said ores as may hereafter be agreed upon between the said parties.

"In witness whereof we have hereunto subscribed our names and affixed our seals the day and date before mentioned.

"[Seal.] The Tombstone Mill & Mining Company,
"By W. J. Cheyney, its General Manager,

"[Seal.] The Empire Milling & Mining Company,
"By D. C. Cutler, President.
"H. S. Vanderbilt, A. C.,
"Empire M. & M. Co."

The plaintiff is a Maine corporation, owning a mine in the territory of Arizona. At the date of the execution of said contract it had not filed copies of its articles of incorporation with the secretary of said territory, as provided by its laws, nor appointed an agent for the service of process. It is admitted that said contract was not made in said territory. The provisions of the Arizona statute referred to are as follows (Rev. St. 1887, tit. 12, c. 7):

"(1) Any company incorporated under the laws of any other state or territory for any enterprise, business pursuit or occupation proposed to be carried on, or the principal office or place of business is proposed to be located within this territory, shall make and file certified and duly authenticated copies of their acts of incorporation with the secretary of this territory and the county recorder of the county in which its business or principal office is located.

"(2) It shall be the duty of any association, company or corporation, organized or incorporated under the laws of any other state or territory or foreign country, for the purposes of engaging in or carrying on any enterprise, business pursuit or occupation, or ac-

quring, holding or disposing of any property within this territory, to file with the secretary of this territory and the county recorder of the county in which such enterprise, business pursuit or occupation is proposed to be located or is located, the lawful appointment of an agent upon whom all notices and processes, including service of summons, may be served, and when so served shall be deemed, taken and held to be a lawful personal service on such association, company or corporation for all purposes whatsoever.

"(3) No corporation such as is mentioned in section 1 of this chapter shall transact any business whatsoever in this territory until and unless it shall have first filed its articles of incorporation, and every act done by it prior to the filing thereof shall be utterly void."

The plaintiff contends that, if the foregoing provisions could be so construed as to extend to single isolated contracts, such as that here in question, the statute would be unconstitutional, because in conflict with the commercial clause of the federal constitution. This statute merely requires compliance by foreign corporations with reasonable requirements as a condition precedent to their right to do business within the territory. It is well settled that such reasonable provisions are valid. *Manufacturing Co.* v. *Ferguson,* 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; *Bank* v. *Page,* 6 Or. 431; *Paul* v. *Virginia,* 8 Wall 168, 19 L. Ed. 357; *In re Comstock,* 3 Sawy. 218, Fed. Cas. No. 3,078; *Assurance Co.* v. *Rosenthal,* 55 Ill. 85. But the question also arises whether this contract by which the plaintiff employed the defendant to develop its mine amounts to a carrying on of business in the territory of Arizona, as contended by defendant. The contract provides that, inasmuch as the defendant had opened up its mine in such a way as to afford an opportunity to exploit and develop the plaintiff's mine at less cost and in shorter time than it could possibly be done through plaintiff's shaft, defendant would undertake said work for the plaintiff, and "binds itself to prospect and develop the said mine, using its best knowledge, skill, and care," and to report the results, and to afford to the plaintiff reasonable facilities for inspecting work, etc. The agree-

ment in regard to the taking out of ore is only conditional and incidental, it being provided that, "should any marketable ore be extracted in the course of the aforesaid developments," the defendant should sell it and account to the plaintiff. The single contract for the doing of this work, which, presumably was precedent to a determination by plaintiff whether it would or would not do business in the territory of Arizona, is not a carrying on of business, within the provisions of said statute. It is settled that isolated transactions, such as the making of a single contract for a limited purpose, are not within the prohibition of such statutes. Thomp. Corp. § 7936, and cases cited; *Manufacturing Co.* v. *Ferguson, supra; Paul* v. *Virginia, supra.* The demurrers to the defenses based on this statute are sustained.

The next question raised by the demurrers affects the ownership of the ore beneath the surface. Defendant, in extending its shafts into the territory included within the surface lines of plaintiff's mine, found that in making their original location they mistook the direction of the lode, and made said location crosswise instead of lengthwise of the vein. In following the vein under plaintiff's surface lines, they found that the vein, the apex of which was on their property, extended laterally under the surface of plaintiff's location. The federal statutes of 1872 in regard to the location of mining claims are as follows:

"Sec. 2320. Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining

regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end-lines of each claim shall be parallel to each other."

"Sec. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

The purport of this statute is that at their ends, locations shall be bounded by vertical planes, but that at the sides they may follow the dip of the vein, even though they extend under the surface of other locations. These regulations have been interpreted as showing an intent that mining locations should be in the shape of parallelograms, the end lines crossing the strike of the vein at nearly right angles to it, and the side lines substantially parallel to said strike. *Iron Silver M. Co.* v. *Elgin M. & S. Co.*, 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98. It has sometimes happened, however,—as in the present instance,—that by mistake a prospector or locator has accidentally located his claim crosswise of a vein instead

of parallel thereto. In such a case it is well settled that his side lines as located become his end lines, and that he cannot proceed beyond the limit of a vertical plane extended downward therefrom. The question here raised and claimed to be novel is this: In such a case, do the end lines become side lines in the sense that the locator may follow the dip of the vein outside of a plane extended vertically downward therefrom? In *Mining Co.* v. *Tarbet*, 98 U. S. 463, 38 L. Ed. 253, the court said, referring to such a condition:

> "It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. * * * The location of the plaintiffs in error is thus laid across the Titus lode,—that is, across the course of its apex at or near the surface; and the side lines of the location are really the end lines of their claim, considering the direction or course of the lode at the surface. As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines, properly so called, which lines are those which are crosswise of the general course of the vein on the surface."

Counsel for the plaintiff claims that, inasmuch as the individual who locates his claim crosswise of a vein makes a mistake in so doing, he must suffer the penalty for said mistake, and that beyond the vertical plane of his boundary lines he has no extralateral rights. That is to say, that the end lines as originally located remain end lines in the sense of the statute, while the original side lines also become end lines, and the claim thus becomes bounded by four end lines, beyond the vertical planes of none of which the owner may follow the dip of the lode. Counsel for defendant contends that, inasmuch as the supreme court has repeatedly, without any qualifications, said that the side lines in such case become the end lines and the end lines side lines, and as the statute defines what shall be the rights of a locator with reference to his end and side lines, those rights attach as a matter of

course to the new side lines, and that the party who makes the mistake is sufficiently punished or limited by reason of the fact that he cannot extend his boundaries beyond the new end lines. Although no decision has been cited where this precise question was in issue, the latter view seems more in accord with the language and spirit of the decisions in somewhat analogous cases. Thus, in *King* v. *Mining Co.*, 152 U. S. 222, 228, 14 Sup. Ct. 512, 38 L. Ed. 422, the court says:

"The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights as his imperfect location warrants under the statute. It cannot relocate his claim, and make new side lines or end lines. Where it finds, as in this case, that what are called side lines are in fact end lines, the court, in determining his lateral rights, will treat such side lines as end lines and such end lines as side lines."

In *Last Chance M. Co.* v. *Tyler M. Co.*, 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859, Mr. Justice Brewer, in delivering the opinion of the court, says:

"The course of this vein is across the Last Chance claim, instead of in the direction of its length. Under those circumstances the side lines of that location become the end lines, and the end the side lines. *Mining Co.* v. *Tarbet*, 98 U. S. 463, 25 L. Ed. 253; *Argentine M. Co.* v. *Terrible M. Co.*, 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140; *King* v. *Mining Co.*, 152 U. S. 222, 14 Sup. Ct. 510, 38 L. Ed. 419."

In *Consolidated Wyoming M. Co.* v. *Champion M. Co.* (C. C.) 63 Fed. 540, 547, the general principle is thus stated:

"When a mining claim is located across, instead of along, the lode, its side lines must be treated as its end lines, and its end lines as its side lines; so that, under Rev. St. § 2322, the dip cannot be followed outside the vertical plane of the original side lines into an adjoining claim."

The principle above stated seems to be in accord with that of the decisions in the following cases, in most of which the lode, while passing through the end of the claim as located, passed out at one of the sides, or from some other cause failed to reach the other end: *Mining Co.* v. *Tarbet*, 98 U. S. 463, 25 L. Ed. 253; *Iron Silver M. Co.* v. *Elgin M. & S. Co.*, 118 U. S. 196, 8 Sup. Ct. 1177, 30 L. Ed. 98; *Argentine M. Co.* v. *Terrible M. Co.*, 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140; *King* v. *Mining Co.*, 152 U. S. 222, 14 Sup. Ct. 510, 38 L. Ed. 419; *Del Monte M. & M. Co.* v. *Last Chance M. & M. Co.*, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; *Walrath* v. *Mining Co.*, 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170. A careful examination of the case of *Catron* v. *Old* (Colo. Sup.) 48 Pac. 687, relied on by counsel for plaintiff, shows that the question herein involved was not presented on the record. The demurrers on this point are overruled.

Another contention of the parties raised by the demurrers is upon the question of estoppel by deed and in pais. Plaintiff claims that, as the defendant went upon the property of the plaintiff, and removed and sold said ore under said contract, it cannot now claim that it was not the property of the plaintiff. In short, that this is the case of an executed contract where the plaintiff, having performed its part of the contract, and permitted the defendant to take the property under an agreement to account for the same, now finds the defendant denying its title, and refusing to pay, and thereupon plaintiff brings its action for money had and received. Defendant, in exploiting and developing for plaintiff found that the ore thus brought to light was its own property. Neither party anticipated any such result when the contract was made. The defendant is not estopped from claiming title to its property. The demurrers on this point are overruled.

building, on the day of the accident, a quantity of dynamite had been placed which exploded during the dinner hour killing the deceased, who was then eating his dinner in the compressor building, and also two other employes who appeared to have been, at the time, in or about the adjoining engine house. The evidence showed that the defendant used large quantities of dynamite or dualine, which is a high explosive, kept usually in a frozen state and requiring to be thawed out to fit it for use. It explodes at 360° F., or through friction, and in order to reduce the frozen sticks to pasty consistency for immediate use they were placed in the engine room near the steam pipe, where the heat ranged between 90° and 100° F. The dynamite was stored in an isolated magazine about 1,000 feet from the engine house, carried thence in wooden boxes and laid in a specially constructed zinc case in quantities generally of two boxes at a time when being thawed out for use, but at the time of the accident there were two unopened wooden boxes of dynamite in the engine room besides about the same quantity in the zinc case and no person had been placed particularly in charge of it or of the engine house during the dinner hour. This building was open on all sides and could be freely entered. At the time of the accident, one of the victims who had been sent by the foreman into the building to get some of the dualine and fulminating caps, was seen coming rapidly out of the engine house door and crying, "fire! fire!" and the explosion followed immediately, with the fatal results already stated.

The actual cause of the explosion of the dynamite was not proved, but theories were advanced of spontaneous explosion arising from proximity to the steam pipes, or fire set to rubbish by carelessness, generating sufficient heat to explode the dynamite. The plaintiff charged the defendant with imprudence in allowing so large a quantity of dynamite to remain unguarded in such a dangerous place and for neglect to make

proper arrangements and provide facilities to prepare it for use in some isolated situation.

The trial court maintained the action and awarded $1,000 damages to the plaintiff personally and an additional $1,000 damages on behalf of the children and found that the deceased had not been guilty of contributory negligence, that the cause of the explosion was unknown and that imprudence and neglect on the part of the defendant had been established by the evidence.

The Court of Review affirmed the trial court judgment and considered that the defendant was in fault in imprudently placing so large a quantity of dynamite in the engine room without anyone to take charge of it, especially while the engineers had gone away for dinner. The defendant appealed from the latter judgment.

LAFLAMME for the appellant cited *Montreal Rolling Mills Co.* v. *Corcoran,* 26 Can. S. C. R. 595; *Mercier* v. *Morin,* Q. R. 1 Q. B. 86; *Dominion Cartridge Co.* v. *Cairns,* 28 Can. S. C. R. 361; *Canada Paint Co.* v. *Trainor,* 28 Can. S. C. R. 352; *George Matthews Co.* v. *Bouchard,* 28 Can. S. C. R. 580; *Burland* v. *Lee,* 28 Can. S. C. R. 348; *Tooke* v. *Bergeron,* 27 Can. S. C. R. 567.

L. C. BELANGER, Q. C., for respondent. The cause of death was the explosion which occurred through the negligence of defendant in placing dangerous material in unusual and unnecessary quantities in an unsafe situation and cases of mysterious accident from unknown cause do not apply. If dynamite had not been carelessly left lying about and unprotected, the deceased would not have suffered. *Garon* v. *Anglo-Canadian Asbestos Co.,* Q. R. 3 S. C. 185; Arts. 1053, 1056 C. C. Employers are liable when the accident might have been avoided, no matter how extensive or extraordinary

the measures of precaution required. *Vide* Caen, 22 Dec., 1876; S. V. '77, 2, 49; Aix. 10 January, 1877; S. V. '77, 2, 336; 27 Nov. 1877; S. V. '78, 2, 232; Art. 1055 C. C. We refer also to *Robinson* v. *The Canadian Pacific Railway Co.*, M. L. R. 2 Q. B. 25, (reversed in Supreme Court, but as to the solatium only,) 14 Can. S. C. R. 105, 19 Can. S. C. R. 292; (1892) A. C. 481; *Canadian Pacific Railway Co.* v. *Goyette,* 30 L. C. Jur. 207, M. L. R. 2 Q. B. 310; *Belanger* v. *Riopel,* M. L. R. 3 S. C. 198, 258; *Holmes* v. *McNevin,* 5 L. C. Jur. 271; *Legault* v. *City of Montreal,* 17 R. L. 279, Art. 877, par. 6; Art. 1011, R. S. Q. 55-56 V.; c. 20, Quebec; *Ibbotson* v. *Trevethrick,* Q. R. 4 S. C. 318; *Town of Prescott* v. *Connell,* 22 Can. S. C. R. 147.

The judgment of the majority of the court was delivered by:

KING, J. Assuming it to be reasonable as between the mine owners and their servant that the dynamite needed for immediate use in the mines should be taken from the magazine to the hoisting engine house at the pit's mouth, there to be thawed out in preparation for use, the evidence still shows that an unnecessary large quantity was accumulated there at the time of the explosion.

The dynamite (or dualine as this preparation of it was called), as received from the manufacturers was contained in wooden boxes of from 18 to 20 inches in length by 15 by 9. The dynamite in each box weighed about 50 pounds, and was in the shape of sticks, of which there were sixty or seventy in each box. It was purchased by defendants in large quantities from the manufacturers, and was stored in a magazine constructed for the purpose upon defendant's premises at a safe distance from the works, having regard to the possibility of an explosion.

It appears from the evidence of Williams, the superintendent of the mine, that the daily average use was about four boxes, and that the course of business was that a person specially entrusted with the duty would in the morning and again at noon, carry two of the boxes from the magazine to the hoisting engine room, where they would be deposited in a certain manner near a steam pipe for the purpose of being thawed, the temperature of the sticks being originally at about 40° Fahrenheit. This transfer of two boxes at each of these stated periods, instead of the entire number for the day at one time, evidently points to this as being in the opinion and practice of the company, a reasonable limit to the quantity to be accumulated in proximity to the works.

The like conclusion follows upon the fact that the company with a view to safety had prepared a specially constructed zinc box in which to place the dynamite brought from the magazine, and that the capacity of this was limited to that of two of the original boxes. It consisted of two zinc boxes placed one inside the other, with an air space of a couple of inches all around between the two, and as thus constructed it is stated by the superintendent to be the best sort of a receptacle for the purpose. In ordinary course when the two original boxes were brought from the magazine their contents were transferred to the zinc box.

The following appears in the examination of the superintendent:

Q. Did you ever have, to your knowledge, more dynamite in that building than you absolutely required for the daily use?

A. It has happened that there has been some left from the night that has not been used up that day.

Q. As a rule there never was more than two or three boxes?

A. No, sir.

Now it appears that at the time of the explosion, although half the working day was over, there were nearly four boxes in the hoisting engine house. The zinc box, capable of containing two of the original boxes, was nearly full, and there were also, upon the platform beside it, two other of the original boxes which had not been opened at all, in all a quantity of between 150 and 200 pounds in weight.

The defendants produced an expert witness named Penhale, the manager of another asbestos mine. It appears that at his works the magazine was 1,500 feet distant from other buildings, and that the thawing out process was carried on in a small building separate from others which, when not in use, was kept locked. Upon his direct examination, the following occurs:

Q. How many times a day or a week do you carry a certain quantity of dynamite from the magazine to the distributing point?

A. It is usually brought down a box at a time.

Q. And when this box is used up?

A. More is brought down.

Then on cross-examination:

Q. What quantity at a time do you allow to be kept in the distributing building?

A. Only a box at a time, and, as it is used, it is replaced.

Clearly, therefore, upon the evidence adduced by the defendants themselves, there was, at the time of the explosion, an unnecessary and unreasonable quantity of this highly dangerous explosive in dangerous proximity to the workmen engaged in carrying on their work, and no attempt is made to excuse or explain the circumstances.

The negligence involved in this was one of the efficient causes of Rivard's death which, as admitted and as found, was caused by the explosion that in fact took place, and was not the conjectural consequence of a smaller explosion.

The peril to life from high explosives is so great and, as shown by the evidence, the cause of their explosion frequently so obscure, that damage may fairly be anticipated as likely to ensue from the act of one who accumulates an unusual and unreasonable quantity in dangerous proximity to others. In placing it where an opportunity for damage may be created, either by the nature of the substance or by fortuitous circumstance or neglect of others or other cause, he takes the chance of the happening of such other event and cannot disconnect himself from the fairly to be anticipated consequences of his own negligence.

It hence becomes unnecessary to determine as to other agencies contributing to the result, provided it appears that neither the deceased (nor any one whose act or omission may prove a legal bar) had any connection with it, and that he is not precluded from urging defendant's neglect.

Then as to whether Rivard had any part in causing the explosion; he was employed as engineer in a wholly distinct but contiguous building, and his body was found more remote from the point of explosion than the farthest limits of his engine house. Besides, the fact that victuals were found in his mouth shows (as stated by the superintendent) that he was eating his dinner when the explosion took place, and the court below naturally acquitted him of all participation in the cause of the explosion.

Then as to the acts or omissions of fellow servants. According to the French law common employment is no defence, and does not exonerate the employer from liability for the negligence of a servant who may by his negligence have caused an accident from which another servant has suffered. This has been held more than once in this court. *The Queen* v. *Fillion,* 24 Can. S. C. R. 482; *The Queen* v. *Greiner,* 30 Id. 42. Nor was the deceased a consenting party to the excessive quantity of dynamite being deposited near

him, for the evidence shows that the deposit of such a quantity was contrary to the usual course of business.

In the declaration (after averring that the explosion which caused the death was that of at least three boxes of dualine, in the building contiguous to that occupied by the deceased), it is avered that

"It was an act of gross neglect on the part of the defendant to leave such a large quantity of explosive matter, such as dualine, in the said building, and the death of the said Theodore Rivard resulted from, and was due to the carelessness, gross neglect, and fault of the said defendant."

In what has been adduced there is proof of this allegation and hence *the appeal should be dismissed.*

GWYNNE, J. Filed dissenting opinion.

Appeal dismissed with costs.

Solicitors for the appellant: GREENSHIELDS, GREENSHIELDS, LAFLAMME & DICKSON.

Solicitor for the respondent: L. C. BELANGER.

G. S. CHAPPIUS ET AL. v. WILLIAM BLANKMAN ET AL.

(128 California 362; 60 Pac. 925. Supreme Court. April 7, 1900.)

Executor holding title in his individual name. Where an executor purchases a mining property with the funds of the estate, and takes title in his individual name, and, while the title so stands of record, laborers are employed by one, under the authority of the executor, to pump water out of the mine, and to take out ore, for which they are not paid, upon the filing of their claims for liens the laborers become "encumbrancers for value," within Civil Code, § 856, providing that no implied or resulting trust can prejudice the rights of a purchaser or incumbrancer of real property for value, without notice of the trust.

[1]**Stoping.** Labor performed in breaking down and tearing away from the face of the drifts and mine the quartz and other substances in a mine is within the provisions of Code Civ. Proc. § 1183, giving a lien for labor "in the construction, alteration or repair of a mine."

In bank. Appeal from Superior Court, Placer County.

Action by G. S. Chappius and others against William Blankman and another for the foreclosure of a mechanic's lien. From a judgment for plaintiffs, defendants appeal. Affirmed.

[1]*Hines* v. *Miller*, 19 M. R. 609.

Laborer on quartz mill standing on the claim held entitled to lien on the mine. *Thompson* v. *Wise Boy Co.* — Ida. —; 74 Pac. 958.

A mechanic's lien is not allowed for materials furnished to supply ordinary wear and tear. *Ripley* v. *Cochiti Co.* — N. M. —; 76 Pac. 285.

Party furnishing machinery for mill treated as an original contractor, not as a material-man. *Salt Lake Co.* v. *Chainman Co.* 128 Fed. 509.

The lien is not lost by clause that title should not pass till all payments made. *Id.*

An underground miner is entitled to a lien. A mine is a structure for the purpose of a mechanic's lien. *Helm* v. *Chapman*, 66 Cal. 291; 5 Pac. 352.

JOHN M. FULWEILER, for appellants.

LARDNER & BURNS, PULLEN & WALLACE and CHARLES TUTTLE, for respondents.

GAROUTTE, J. This action is brought to foreclose mechanics' liens for labor performed upon a mining claim. Defendant De Varila suffered default. Defendant Blankman appeared, and now appeals from the judgment and order denying his motion for a new trial. The material facts are briefly these: Blankman was the executor of the last will and testament of David Buck, deceased. As such executor, under an order of the probate court he paid the balance due upon a contract of sale for the purchase of the Eclipse quartz

Workmen under lessee have no lien on the mine. *Pelton* v. *Minah M. Co.*, 11 Mont. 281; 28 Pac. 310. *Morrell Co.* v. *Princess Co.*, 16 Colo. App. 54; 63 Pac. 807.

Construction of the California lien act with regard to a claimant furnishing explosives from time to time. *Cal. Powder Works* v. *Blue Tent Mines* (Cal.); 22 Pac. 391.

A coal mine is an "improvement." Coal cars are "material" if not "fixtures or machinery." *Central Co.* v. *Sheffield Co.*, 42 Fed. 106.

Mechanic's lien does not lie for building road to claim. *Williams* v. *Toledo Co.*, 25 Oreg. 426; 36 Pac. 159.

A smelter is a mill under the mechanic's lien law. *McAllister* v. *Benson Co.*, 2 Ariz. 350; 16 Pac. 271.

Hoisting works and track are a part of the mine and their builder has a lien on the mine for such improvements. *Silvester* v. *Coe Q. Co.*, 80 Cal. 510; 22 Pac. 217.

By furnishing new materials contractors cannot revive a lien, the time for filing which is past. *Cahoon* v. *Fortune Co.* — Utah —; 72 Pac. 437.

Mechanic's lien may be filed on claims worked as a group and proof of group is that they were commonly known as the "Salem Mine." *Phillips* v. *Salmon R. Co.* (Ida.); 72 Pac. 886.

A foreman and watchman is entitled to lien. *Idaho Co.* v. *Davis*, 123 Fed. 396.

Where several claims are operated as one mine the services need not be apportioned to each claim. *Id.*

mine, which contract had been entered into by Buck during his lifetime. Blankman took the deed in his individual name, and it was subsequently recorded in Placer county, where the mine was situated. Notwithstanding the title to this property stood in the name of Blankman, it was the property of the estate of Daniel Buck, deceased, and was returned as the property of that estate, in the inventory and appraisement thereof. In addition to this fact, throughout the administration the property was recognized and treated as the property of said estate. Pending the administration Blankman wrote a letter to De Varila in substance as follows:

"Referring to our recent conversation in re the Eclipse Gold Quartz Mine, Consolidated, I will say that as executor of the estate of Daniel Buck, deceased, I hereby direct and empower you to pump out, open, and work, for the benefit of the said estate of Daniel Buck, deceased, and all persons interested therein, * * * the said Eclipse Quartz mine. This work will, of course, be quite expensive to you, and, in recompense for the risk thereby taken, you will keep to yourself $^{50}/_{100}$ of the net proceeds of said mine; the remaining $^{50}/_{100}$ of the net proceeds to be paid to the estate of Daniel Buck, deceased, for the use above described.

"William Blankman, Ex'r."

Upon the receipt of this letter, De Varila employed laborers, and proceeded to work the mine, by pumping out the water, taking out the ore, etc. These laborers now form the plaintiffs, who are bringing the present action to foreclose their liens upon the mine for the labor so performed.

It does not appear necessary to give a construction to this letter under which De Varila went to work on the mine. It may have been a lease of the mine, or it may have been only a hiring of De Varila. Whatever the writing amounted to in law, it was given by Blankman, as executor; and, if it was notice of anything to plaintiff, it was notice of everything it contained. And, whatever authorization was found in the writing, it was not an authorization by Blankman individu-

ally, but by Blankman as executor, and as executor he had no power to make any contract which would give plaintiffs a right to file liens upon the property of the Buck estate. *Fish* v. *McCarthy,* 96 Cal. 484, 31 Pac. 529. But, in addition to this, it may be added that plaintiffs knew nothing whatever of this writing held by De Varila. Again, we attach no impotance to the pending probate proceedings of Buck's estate in the city and county of San Francisco. Those proceedings afforded no notice to plaintiffs in Placer county as to the status of the title to the mine. *Nidever* v. *Ayers,* 83 Cal. 39, 23 Pac. 192.

After clearing away the underbrush, the case, in its facts, is reduced to a very simple form. De Varila took possession of the mine, and hired these plaintiffs to work therein. At that time the legal title to the property stood in the name of Blankman, and plaintiffs had constructive notice of the fact by reason of the recordation of the deed to Blankman in Placer county. De Varila was working the mine without objection upon the part of Blankman, and with his knowledge. Upon this state of facts, it is contended by respondents that the transaction of the executor, Blankman, in paying out the money of the estate for the mining property, and taking the deed thereto in his own name, amounted in law to the creation of an implied or resulting trust wherein he was the trustee. And for that reason it is further claimed that section 856 of the Civil Code contains the rule of law applicable to the aforesaid facts. The section provides: "No implied or resulting trust can prejudice the rights of a purchaser or incumbrancer of the real property for value, and without notice of the trust." In view of this section it is then claimed that the respondents are incumbrancers for value, and therefore the existence of the trust cannot prejudice their rights. If Blankman had sold this property to a bona fide purchaser for value without notice of the title of the estate, such a purchaser would have held the property against the estate,

under the law declared in the foregoing section of the Code; for he would have been a purchaser answering to the description laid down in that section. A mortgagee who answered to the description declared in that section would likewise be an incumbrancer, as against the title of the estate. And, although there is no authority found upon the question, as far as our investigations have gone, yet we have arrived at the conclusion that these plaintiffs have brought themselves within the aforesaid section of the Code, and may be termed incumbrancers of the kind there described. They parted with their labor,—a thing of value,—upon the knowledge that Blankman was the owner of the property. They did the work in good faith, and had no notice that the estate of Buck held the equitable title to the property. Upon the filing of their liens, their rights related back to the time that the labor was performed, and upon the filing of their liens they became incumbrancers within the aforesaid section of the Civil Code.

It is contended that the work done for which liens are claimed, to wit, "breaking down and tearing away from the face of the drifts and mine the quartz and substance of the mine," is work and labor tending to destroy the property, rather than improve it, and was not labor performed " in the construction and alteration or repair of the mine," for which liens are allowed under sections 1183-1192, Code Civ. Proc. Upon this point we are satisfied said section 1183 is sufficiently broad to entitle these plaintiffs to file liens for the work done. For the foregoing reasons, the judgment and order are affirmed.

VAN DYKE, J., MCFARLAND, J., HARRISON, J., and HENSHAW, J., concurred.

OHIO OIL CO. v. INDIANA.

(177 U. S. 190; 20 S. C. Rep. 576. Supreme Court. April 9, 1900.)

[1]**The Indiana Statute forbidding waste of natural gas** compelling steps to prevent its escape, within two days after struck in the well, is not in violation of the Federal Constitution.

The enforcement of such act by injunction is not a taking of property without compensation nor is it a denial of due process of law, but is only a state regulation of a subject which comes within the lawful powers of the state.

[2]**The supposed deposition of oil and gas in natural underground reservoirs** considered, with regard to the fact of diverse ownerships and the pressure or escape of the gas having an effect to drain adjoining lands owned by others with the holding that it is a matter for state regulation unaffected by any provision of the U. S. Constitution.

[3]**No ownership in oil or gas until severed.** The doctrine that a land owner, although entitled to bore wells for natural gas and oil, has

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[1]State cannot prohibit transportation of natural gas from the state. *Manufacturers Co.* v. *Indiana Co.* 155 Ind. 545; 21 M. R. —.

The transport of natural gas is a public use and a natural gas company is entitled to the exercise of the right of eminent domain to run its pipes. *Johnston's App.* (Pa.) 7 Atl. 167.

Natural gas is declared by Pennsylvania statute a necessity, and corporations having power to deal in the same have the right of eminent domain. *Carothers* v. *Philadelphia Co.*, 118 Pa. 468; 12 Atl. 314.

[2]The use of force pump to produce artificial pressure in oil well is lawful. *Jones* v. *Forest Oil Co.* 20 M. R. 350.

Indiana statute forbidding wasteful use of natural gas in flambo lights and making such wasteful use a misdemeanor upheld as constitutional. *Townsend* v. *State*, 147 Ind. 624; 47 N. E. 19.

The Indiana act forbidding artificial pressure to increase the flow is not violated by the use of pumps to a degree not destroying the back pressure. *Richmond Co.* v. *Enterprise Co.*, 31 Ind. App. 222; 66 N. E. 782.

Construction of Indiana act compelling means to be taken to prevent escape of gas. *Given* v. *State*, 160 Ind. 562; 66 N. E. 750.

[3]No title till severed. *Calhoon* v. *Neely*, 201 Pa. 97; 21 M. R. —. *Hail* v. *Reed*, 11 M. R. 103. *Westmoreland N. G. Co.* v. *DeWitt*, 130 Pa. 235; 18 Atl. 724.

no title to those substances as owner until they are actually reduced by him to possession, is settled as a rule of property in the state of Indiana.

Error to the Supreme Court of the State of Indiana to review a decision affirming a judgment sustaining a statute prohibiting the waste of natural gas and oil. Affirmed.

See same case below, 150 Ind. 698, 50 N. E. 1125.

The title, preamble, and first section of a law enacted in 1893 by the state of Indiana (Acts 1893, p. 300) are as follows:

"An act concerning the Sinking, Safety, Maintenance, Use and Operation of Natural Gas and Oil Wells, Prescribing Penalties and Declaring an Emergency.

"Whereas, great danger to life and injury to persons and property is liable to result from the improper, unsafe, and negligent sinking, maintenance, use, and operation of natural gas and oil wells; therefore,

"Sec. 1. Be it enacted by the general assembly of the state of Indiana, That it shall be unlawful for any person, firm, or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes or other safe receptacle, for a longer period than two (2) days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles."

The remaining sections of the law in question are printed in the margin.†

†Sec. 2. Whenever any well shall have been sunk for the purpose of obtaining natural gas or oil or exploring for the same, and shall be abandoned or cease to be operated for utilizing the flow of gas or

The issue which this record presents, on the subject of the law just referred to, is this: Did the enforcement of the first section of the statute produce as to the persons whose obedience to its commands were coerced by injunction, a taking of private property without adequate compensation; that is, did the execution of the statute amount to a denial of due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States?

The controversy was thus initiated: The state of Indiana, through its attorney general, filed a complaint in the circuit court of the county of Madison in the state of Indiana, against the Ohio Oil Company, a corporation organized under the laws of the state of Ohio, but authorized to carry on its business in the state of Indiana, as it had complied with the regulations enacted by that state as to foreign corporations doing business therein. The cause of complaint was thus stated:

"Plaintiff says that for many years heretofore there has existed, underlying the counties of Madison, Grant, Howard, Delaware, Blackford, Tipton, Hamilton, Wells and other counties of the state of Indiana, a large subterranean deposit

oil therefrom, it shall be the duty of any person, firm or corporation having the custody or control of such well at the time of such abandonment or cessation of use, and also of the owner or owners of the land wherein such well is situated, to properly and securely stop and plug the same as follows: If such well has not been "shot" there shall be placed in the bottom of the hole thereof a plug of well-seasoned pine wood, the diameter of which shall be within ½ inch as great as the hole of such well, to extend at least 3 feet above the salt water level, where salt water has been struck; where no salt water has been struck, such plug shall extend at least 3 feet from the bottom of the well. In both cases such wooden plugs shall be thoroughly rammed down and made tight by the use of drilling tools. After such ramming and tightening the hole of such well shall be filled on top of such plug with finely broken stone or sand, which shall be well rammed to a point at least 4 feet above the Trenton limestone, or any other gas or oil bearing rock; on top of this stone or sand there shall be placed another wooden plug at least 5 feet long with the diameter as aforesaid, which shall be thoroughly ram-

of natural gas, occupying a reservoir of large extent, with well defined boundaries, and utilized for fuel and light by the people of those counties and many other counties and cities of Indiana, including Indianapolis, Fort Wayne, Richmond, Logansport, Anderson, Muncie, Marion, Kokomo, and others of the most populous cities of said state, to which cities said gas is conducted, after being brought to the surface of the earth, through pipes and conduits, by means of which many hundreds of thousands of the people of the state of Indiana are now and have been for more than ten years last past continuously supplied with gas for light and fuel; that said natural gas underlying the counties aforesaid and other portions of the state is contained in and percolates freely through a stratum of rock known as Trenton rock, comprising a vast reservoir, in which the gas is confined under great pressure, and from which it escapes, when it is permitted to do so, with great force.

"The fuel supplied by the natural gas thus obtained is the

med and tightened. In case such well shall have been "shot," the bottom of the hole thereof shall be filled with a proper and sufficient mixture of sand, stone, and dry cement, so as to form a concrete up to a point at least 8 feet above the top of the gas or oil bearing rock or rocks, and on top of this filling shall be placed a wooden plug at least 6 feet long, with diameter as aforesaid, which shall be properly rammed as aforesaid. The casing from the well shall then be pulled or withdrawn therefrom, and immediately thereafter a cast-iron ball 8 inches in diameter shall be dropped in the well and securely rammed into the shale by the driller or owner of the well, after which not less than 1 cubic yard of sand pumping or drilling taken from the well shall be put on top of said iron ball.

Sec. 3. Any person or corporation violating any of the provisions of this act shall be liable to a penalty of $200 for each and every such violation, and to the further penalty of $200 for each ten days during which such violation shall continue; and all such penalties shall be recoverable in a civil action or actions, in the name of the state of Indiana, for the use of the county in which such well shall be located, together with reasonable attorney's fees and costs of suit.

Sec. 4. Whenever any person or corporation in possession or control of any well in which natural gas or oil has been found shall fail to comply with the provisions of this act, any person or corporation

cheapest and best known to civilization, and the value of the natural gas deposit to the state and to its citizens is many millions of dollars; that since the discovery of said gas deposit in 1886 immense sums of money have come into the state and have been invested in large manufacturing interests, and other vast sums of money belonging to the people of the state of Indiana have been invested in similar enterprises, causing a great increase in the population, principally in the territory underlying which said gas is found. Many cities in and adjacent to the gas territory, including those named, are wholly dependent for fuel upon natural gas, and for that reason the people of the state of Indiana have become and are interested in the protection and continued preservation of the natural gas supply; that many millions of dollars invested in manufacturing and other properties in and near said gas territory are wholly dependent for their continued preservation and for the permanent value of their

lawfully in possession of lands situate adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate, and take possession of such well from which gas or oil is allowed to escape in violation of the provisions of § 1 of this act, and pack and tube such well, and shut in and secure the flow of gas or oil, and maintain a civil action in any court of competent jurisdiction in this state against the owner, lessee, agent, or manager of said well, and each of them jointly and severally, to recover the cost and expense of such tubing and packing, together with attorney's fees and costs of suit. This shall be in addition to the penalties provided by § 3 of this act.

Sec. 5. Whenever any person or corporation shall abandon or cease to operate any natural gas or oil well, and shall fail to comply with the provisions of § 2 of this act, any person or corporation lawfully in possession of lands adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate, and take possession of such well, and plug and fill the same in the manner provided by § 2 of this act, and may maintain a civil action in any court of competent jurisdiction of this state against the person, persons, or corporation so failing, jointly and severally, to recover the costs and expenses of such plugging and filling, together with attorney's fees and costs of suit. This shall be in addition to the penalties provided by § 3 of this act.

property upon said natural gas supply; that their location and establishment in said gas territory was due to the presence of natural gas underlying the same, without which such enterprises could not operate at a profit, and that in the event the supply of gas should be exhausted in said territory many of such manufacturing enterprises, in which thousands of the citizens of Indiana find employment at remunerative wages, will be compelled to stop operation.

"That their employees will be thereby thrown out of employment, and many of them, dependent upon their labor for support, may and will become charges upon the state and its several municipal subdivisions; that the property of said manufacturing enterprises and the vast investments depending upon them and related to them will become worthless and the owners will be driven to remove to other parts of the country, taking away from Indiana great wealth now interested in said enterprises as aforesaid.

"That in the cities named and in all the territory known as the 'gas belt' the inhabitants have for years used practically no other fuel than natural gas; that their houses have, in many instances, been constructed with a view to the use of such fuel, and will have to be differently equipped before other kinds of fuel can be used; that the cost of natural gas as fuel to the people of the 'gas belt,' who number several hundreds of thousands, is very much less than that of any other fuel that has ever been or can be procured by them, and that to the other inhabitants of the state using said natural gas it has become and is a source of great convenience, comfort, and increased happiness, because of its cheapness, convenience, and cleanliness as fuel.

"That many small villages in and near the gas territory have within a few years become flourishing and opulent cities.

"That the state's wealth and its revenues derived from taxation on account of such increased population and the va-

rious interests that have been fostered and supported by natural gas have been greatly increased, and will, in the event natural gas gives out, be correspondingly curtailed.

"That the state of Indiana relying upon the permanent supply of natural gas, has at great expense equipped many of its public institutions, including the state house, the Central and other hospitals for the insane, the asylums for the blind and deaf and dumb, the institution for the care of orphans of American soldiers, and other public institutions owned and maintained by the state of Indiana and its various municipal subdivisions, together with the courthouses in many counties, and a vast number of public schools, for the use of natural gas as a fuel, by which the cost of maintaining the public buildings and institutions above named has been materially lessened and the comfort and happiness of their inmates and occupants immensely increased.

"That the supply of natural gas underlying the territory aforesaid is so placed in such Trenton rock that the diminution or consumption of said gas taken from said reservoir affects and reduces correspondingly the common supply.

"That if the gas supply is husbanded and protected it will last for many years and continue to furnish the various cities named with abundant fuel, and the population, wealth, and other material interests of the state will continue to be benefited and enhanced, and the comfort, happiness, and enjoyment of the people of the state greatly increased.

"That underlying a portion of said natural gas territory and at the same levels, occupying the interstices—said Trenton rock in common with said gas, are large quantities of petroleum oil; and that, because of the volatile character of said gas and the pressure under which it is confined in said Trenton rock when said reservoir is tapped by wells drilled into the same from the surface of the earth, said gas and oil will and do escape into the open air in great volumes, unless securely confined in tanks or other proper receptacles.

"That on or about the 25th day of May, 1897, said defendant, the Ohio Oil Company drilled, near the city of Alexandria, in said Madison county, a number of wells into said gas and oil bearing rock, producing natural gas and petroleum as aforesaid in large quantities, which wells are known by the name of the land owner upon whose lands they are situated, which name and the description of said wells are as follows, to wit."

The complaint then enumerated five gas and oil wells which had been opened and were being operated by the defendant for extracting oil, and averred as follows:

"That instead of securely anchoring said wells and each of them when so drilled, so as to confine within the same or within tanks or pipes or other safe receptacles the natural gas produced therefrom within two days after said wells were respectively completed and gas and oil were struck therein, the said defendants, ever since the completion of said wells, all of which have been completed for periods varying from four to nine months, have unlawfully permitted the gas produced therein to flow and escape into the open air, whereby many millions of cubic feet of natural gas have been greatly diminished, and the property of its citizens in and near said gas territory dependent upon the continued supply of natural gas for fuel, as aforesaid, has been greatly damaged and decreased in value.

"That the defendants and each of them avow their purpose to permit said gas to escape continuously and indefinitely hereafter from such wells, and refuse to make any effort to confine the same, but declare their purpose to drill other wells in said gas territory and permit the gas therefrom to flow and escape into the open air, and that if said gas continues to flow from said wells, the supply of natural gas upon which the citizens of said state depend, as aforesaid, will be greatly diminished; that the pressure of said gas, as found in said Trenton rock, will be greatly diminished, and that by

the diminution of said pressure water will accumulate in said rock stratum and ultimately entirely displace and overcome said gas supply.

"Plaintiff therefore says that, because of the wrongful acts of defendants above described, heretofore committed and now continuing its property and that of its citizens has been and will continue to be essentially interfered with, and the comfortable enjoyment of the lives of its citizens greatly interrupted."

Averring the irreparable injury to result from allowing the wells to continue to flow, as stated, the inadequacy of the enforcement of the penalties provided in the statute to meet the evil complained of, and the fact that a multiplicity of suits would be engendered if the writ of injunction prayed for was not issued, the bill charged—

"That the value of the gas wasted by permitting said several wells to remain open each day is of great value, and that, in addition to the value of the same, the whole gas territory or field is greatly damaged by permitting said wells to remain open, in that what is known as 'back pressure,' resulting from the confinement of said gas, is in a great measure relieved and destroyed when said gas is liberated in the manner aforesaid, and that said back pressure is necessary throughout said field in order to prevent the flow of water into said rock stratum and the consequent displacement of the gas therein contained; that, for the protection of said gas supply from the invasion of salt water, it is necessay that in the use of gas from wells drilled into said reservoir only a fraction of the entire volume of said wells should be used, to the end that the back pressure shall be maintained at as high a pressure as possible, and that any other or freer method of using said gas has a tendency to expose the same to danger of salt water, as aforesaid."

The prayer was as follows:

"And plaintiff therefore prays that a temporary order issue

forthwith from this court prohibiting, restraining, and enjoining said defendant, its agents, servants, and employees, from further suffering or permitting the natural gas produced in said wells or any of them, or any part thereof, to longer escape therefrom, and that said defendant be ordered, directed and commanded forthwith to securely confine the same either by anchoring each of said wells or by confining the gas produced therefrom in tanks, pipes or other proper receptacles, and that failing or refusing so to do, the sheriff of Madison county be ordered and directed forthwith to procure necessary materials and labor, and thereby anchor, secure and confine the natural gas produced from said wells and each of them, and that the expense of so doing be taxed as part of the costs of this suit.

"And the plaintiff further prays that upon the final hearing of this cause said defendant company, its officers, servants, agents, and employees, be perpetually enjoined and prohibited from further suffering said gas to escape, and that they be forever thereafter commanded to confine said gas safely and securely in pipes, tanks, or other proper receptacles, and for all proper relief."

The temporary injunction issued as prayed for. The defendant appeared and demurred to the complaint as not stating a cause of action. This was overruled. The defendant then answered as follows:

"The defendant further answering says that before and at the commencement of this action it had in good faith been and then was engaged in the business of producing oil by drilling therefor in the earth and rock below in said county of Madison, and that in the carrying on of said business it had expended many thousands of dollars in the leasing of territory, the purchase of machinery and equipment thereof, and for the drilling of a number of wells and for pipes and pipe lines, all of which it then owned and still owns.

"The defendant admits that it drilled the well complained

of herein, but says that said well was so drilled in good faith solely for the purpose of raising and producing oil, the defendant not being engaged in the business of producing or transporting natural gas in said county and having there no plant for that purpose, and such gas in such case being of no value to defendant, and there being reasonable grounds to believe that oil existed in said territory in sufficiently paying quantities to be utilized.

"That said well complained of was not drilled in or near any village, town, or city, but, on the contrary, was drilled in the country and remote from any dwelling, and the same as so constructed and operated, is not dangerous to life or property.

"That said well was so drilled and completed, oil was found therein in paying quantities, and the defendant proceeded to and did save and utilize the same, paying to the land owner the stipulated royalties therefor, and so operated the same with knowledge, approbation, and consent of such land owner, and was so operating the same solely as an oil well and in entire good faith at the time of the commencement of this action; all of which was so done under and by virtue of a lease to defendant by the owner of said land granted before the commencement of this suit, under which lease defendant owns all the gas and oil in said well and under said land, and said well is of great value as an oil well.

"That in said well and in the same strata of rock whence such oil was produced there were also found at same time quantities of natural gas, which by its own pressure escaped through said pipes and into the open air, said pipes being the same as the ones through which said oil was produced and saved, and in so saving such oil defendant utilized such gas as power, force, and agency to raise said oil from the rock-bearing strata below the surface of the ground, such being the usual, natural, and ordinary method of raising and saving oil in such cases.

"And the defendant further says that no machinery or process of any kind has ever by the highest skill been devised or known to the world whereby in such a case the oil in such well can be produced and saved, unless at the same time such natural gas as may be in such well is suffered to escape, and the defendant charges the fact to be, therefore, that if such gas shall be shut into such well in such case that it will be impossible to raise or produce oil in any such well, and thereby defendant's said business together with its said plant, property, and profits, will be entirely destroyed and the people of said county and state will be deprived of the use and profits of such oil, which is vastly of more value than natural gas in said well; and the defendant says it so operated said well with the highest skill, with the most improved machinery and appliances known to the world, and with employes of the highest skill, and that no more gas was suffered to escape from such well than was consistent with the due operation of said well with the highest skill.

"The defendant further alleges that for many months before the completion of said well it was openly and publicly engaged in acquiring territory, in equipping said plant, in constructing such oil lines, and in incurring the liabilities and paying the money therefor, as hereinbefore alleged, all with the knowledge and acquiescence of the plaintiff and with no notice or knowledge whatever to or on the part of defendant that it would not be allowed to operate such well or wells until after the said money had been so expended and after said well had been so completed.

"That in the territory where said well complained of is situated there are a number of paying oil wells, owned and operated by various persons and corporations, and said field, when properly developed, may reasonably be expected to be a large one for the production of oil, which will be and is of great value to the people of said county."

Referring to the law of Indiana, the context of which has already been stated, the answer contained this averment:

"This defendant further alleges that said act of the general assembly of the state of Indiana, as above set out, violates the Fourteenth Amendment to the Constitution of the United States in this, that it deprives the defendant and others of liberty and property without due process of law, and denies to defendant and others the equal protection of the laws."

The state demurred to the answer as not alleging facts sufficient to constitute a defense. This demurrer was sustained. The defendant refusing to answer further, a decree ganting a permanent injunction was entered. An appeal having been prosecuted to the supreme court of the state of Indiana, in that court the decree of the trial court was in all respects affirmed. 150 Ind. 698, 50 N. E. 1125. This writ of error was thereupon allowed.

Messrs. M. F. ELLIOTT and GEORGE SHIRTS, for plaintiff in error.

Messrs. C. C. SHIRLEY, W. L. TAYLOR, and MERRILL MOORES, for defendant in error.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the court:

The assignments of error all in substance are resolvable into one proposition, which is, that the enforcement of the provisions of the Indiana statute as against the plaintiff in error constituted a taking of private property without adequate compensation, and therefore amounted to a denial of due process of law in violation of the Fourteenth Amendment.

When this proposition is analyzed by the light of the facts which are admitted on the record, it becomes apparent that

the foundation upon which it must rest involves two contentions which are in conflict one with the other; in other words, the argument by which alone it is possible to sustain the claim becomes, when truly comprehended, self-destructive. Thus, it is apparent, from the admitted facts, that the oil and gas are commingled and contained in a natural reservoir which lies beneath an extensive area of country, and that as thus situated the gas and oil are capable of flowing from place to place, and are hence susceptible of being drawn off by wells from any point, provided they penetrate into the reservoir. It is also undoubted that such wells, when bored from many points in the superincumbent surface of the earth, are apt to reach the reservoir beneath. From this it must necessarily come to pass that the entire volume of gas and oil is in some measure liable to be decreased by the act of anyone who, within the superficial area, bores wells from the surface and strikes the reservoir containing the oil and gas. And hence, of course, it is certain, if there can be no authority exerted by law to prevent the waste of the entire supply of gas and oil, or either, that the power which exists in everyone who has the right to bore from the surface and tap the reservoir involves in its ultimate conception, the unrestrained license to waste the entire contents of the reservoir by allowing the gas to be drawn off and to be dispersed in the atmospheric air, and by permitting the oil to flow without use or benefit to anyone. These things being lawful, as they must be if the acts stated cannot be controlled by law, it follows that no particular individual having a right to make borings can complain, and thus the entire product of oil and gas can be destroyed by any one of the surface owners. The proposition, then, which denies the power in the state to regulate by law the manner in which the gas and oil may be appropriated, and thus prevent their destruction, of necessity involves the assertion that there can be no right of ownership in and to the oil and gas before the same have been actually appro-

priated by being brought into the possession of some particular person. But it cannot be that property as to a specified thing vests in one who has no right to prevent any other person from taking or destroying the object which is asserted to be the subject of the right of property. The whole contention, therefore, comes to this: That property has been taken without due process of law, in violation of the Fourteenth Amendment, because of the fact that the thing taken was not property, and could not, therefore, be brought within the guaranties ordained for the protection of property.

The confusion of thought which permeates the entire argument is two-fold: First, an entire misconception of the nature of the right of the surface owner to the gas and oil as they are contained in their natural reservoir, and this gives rise to a misconception as to the scope of the legislative authority to regulate the appropriation and use thereof. Second, a confounding, by treating as identical, things which are essentially separate; that is, the right of the owner of land to bore into the bosom of the earth, and thereby seek to reduce the gas and oil to possession, and his ownership after the result of the borings has reached fruition to the extent of oil and gas by himself actually extracted and appropriated. In other words, the fallacy arises from considering that the means which the owner of land has a right to use to obtain a result is in legal effect the same as the result which may be reached. We will develop the misunderstanding which is involved in the matters just stated.

No time need be spent in restating the general common law rule that the ownership in fee of the surface of the earth carries with it the right to the minerals beneath, and the consequent privilege of mining to extract them. And we need not, therefore, pause to consider the scope of the legislative authority to regulate the exercise of mining rights and to direct the methods of their enjoyment so as to prevent the infringement by one miner on the rights of others. *Del Monte M. &*

M. Co. v. *Last Chance M. & M. Co.*, 171 U. S. 60, 43 L. Ed. 74, 18 Sup. Ct. Rep. 895. The question here arising does not require a consideration of the matters just referred to, but it is this: Does the peculiar character of the substances, oil and gas, which are here involved, the manner in which they are held in their natural reservoirs, the method by which and the time when they may be reduced to actual possession or become the property of a particular person, cause them to be exceptions to the general principles applicable to other mineral deposits, and hence subject them to different rules? True it is that oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed situs under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self-transmission. No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners. Besides, whilst oil and gas are different in character, they are yet one, because they are unitedly held in the place of deposit. In *Brown* v. *Spilman*, 155 U. S. 665, 669, 670, 39 L. Ed. 304, 305, 15 Sup. Ct. Rep. 245, 247, these distinctive features of deposits of gas and oil were remarked upon. The court said:

"Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining for coal, and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when

they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. *Brown* v. *Vandergrift,* 80 Pa. 142, 147; *Westmoreland Natural Gas Co.'s Appeal,* 25 Weekly Notes of Cases (Penn.), 103.

In *Westmoreland Natural Gas Co.* v. *De Witt,* 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724, the supreme court of Pennsylvania considered the character of ownership in natural gas and oil as these substances existed beneath the surface of the earth. The court said:

"The learned master says gas is a mineral, and while *in situ* is part of the land, and therefore possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions. Water, also, is a mineral, but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing or even to percolating waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferœ naturœ.* In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain,' as said by Chief Justice Agnew in *Brown* v. *Vandergrift,* 80 Pa. 147, 148. * * * They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Pos-

session of the land, therefore, is not necessarily possession of the gas."

In *Hague* v. *Wheeler,* 157 Pa. 324, 22 L. R. A. 141, 27 Atl. 714, the question involved in the cause was the right of a land owner who had a gas well on his own land to complain of the escape of gas from a well situated on the land of another. After adverting to the rule embodied in the maxim, *Sic utere tuo ut alienum non lædas,* and after referring to the exceptional nature of the right to acquire ownership in natural gas and oil, it was decided that the complainant was not entitled to relief. The court said (157 Pa. 340, 341, 22 L. R. A. 147, 148, 27 Atl. 719, 720):

"Now, it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction already by the acts regulating the plugging of abandoned wells. * * * In the disposition he may make of it [private property] he is subject to two limitations. He must not disregard his obligations to the public. He must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy, or any positive provision of the written law, he brings himself within reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, subject to these limitations, his power as an owner is absolute until the legislature shall, in the interest of the public, as consumers, restrict and regulate it by statute."

Again, in *Jones* v. *Forest Oil Co.* (January, 1900), 194 Pa. 379, 44 Atl. 1074, the same subject was once more considered. The complaint was filed by one land owner having a gas well on his land, to enjoin the owner of adjoining property from using in a gas well thereon a pump which was as-

In *People's Gas Co.* v. *Tyner*, 131 Ind. 277, 281, 16 L. R. A. 443, 31 N. E. 59, the controversy was this: A lot owner in a town filed a bill for an injunction to prevent a neighboring lot owner from using nitroglycerine "to shoot" a gas well on his property. The court refused the injunction. In the course of the opinion it was said:

"It has been settled in this state that natural gas, when brought to the surface of the earth and placed in pipes for transportation, is property, and may be the subject of interstate commerce. *State* v. *Indiana & O. Oil, Gas & M. Co.* 120 Ind. 575, 6 L. R. A. 579, 22 N. E. 778. Water, petroleum, oil, and gas are generally classed by themselves as minerals possessing in some degree a kindred nature."

After quoting authorities relating to subterranean currents of water, and treating gas and oil before being reduced to possession as of a kindred nature, the court said:

"Like water it is not the subject of property except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie."

The case of *Brown* v. *Vandergrift*, 80 Pa. 142, from which we have previously quoted, was then referred to, and the analogies between oil and gas and animals *feræ naturæ* were approved and adopted. In *Townsend* v. *State*, 147 Ind, 624, 37 L. R. A. 294, 49 N. E. 14, the constitutionality of a statute forbidding the burning of natural gas in flambeau lights was attacked because it was asserted to violate the Fourteenth Amendment to the Constitution of the United States and various provisions of the Constitution of the state of Indiana. The court held that the statute was not amenable to the assaults made upon it. In a full opinion reviewing the nature of the ownership in oil and natural gas, the power of the state to regulate and control their use and waste in the interest of all those within the gas field and of the public at large was elaborately considered. Reviewing its own previous adjudi-

cations, which we have cited, and those of the supreme court of the state of Pennsylvania, to which we have also referred, it was decided that the owners of the surface of the land within the gas field, whilst they had the exclusive right on their land to sink wells for the purpose of extracting the oil and gas, had no right of property therein until by the actual drawing of the oil and gas to the surface of the earth they had reduced these substances to physical possession. It was further held that in consequence of the nature of the deposits, of their transmissibility, of their interdependence, of the rights of all and of the public at large, the state could lawfully exercise the power to regulate the right of the surface owners among themselves to seek to obtain possession, and to prevent the waste of the products in which all the surface owners within the area wherein the gas and oil were deposited, as well as the public, had an interest, because in the preservation of these substances the well-being and prosperity of the entire community was largely involved. And it was upon the opinion announced in that case that the court rested its decree in the case now under review.

Without pausing to weigh the reasoning of the opinions of the Indiana court in order to ascertain whether they in every respect harmonize, it is apparent that the cases in question, in accord with the rule of general law, settle the rule of property in the state of Indiana to be as follows: Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. It is also clear from the Indiana cases cited that, in the absence of regulation by law, every owner of the surface within a gas field may prosecute his efforts and may reduce to possession

all or every part, if possible, of the deposits, without violating the rights of the other surface owners.

If the analogy between animals *ferœ naturæ* and mineral deposits of oil and gas, stated by the Pennsylvania court and adopted by the Indiana court, instead of simply establishing a similarity of relation, proved the identity of the two things, there would be an end of the case. This follows because things which are *ferœ naturæ* belong to the "negative community;" in other words, are public things subject to the absolute control of the state, which, although it allows them to be reduced to possession, may at its will not only regulate, but wholly forbid, their future taking. *Geer* v. *Connecticut*, 161 U. S. 519, 525, 40 L. Ed. 793, 795, 16 Sup. Ct. Rep. 600. But whilst there is an analogy between animals *ferœ naturæ* and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of someone else within the gas field. It being true as to both animals *ferœ naturæ* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *ferœ naturæ* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This

difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No devesting of private property under such a condition can be conceived, because the public are the owners, and the enacting by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to the property of that character. *Geer* v. *Connecticut,* 161 U. S. 519, 525, 40 L. Ed. 793, 795, 16 Sup. Ct. Rep. 600. On the other hand, as to gas and oil the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united though separate. It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *ferœ naturœ,* which it is unquestioned the legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession, may be ultimately

efficaciously enjoyed. Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the state of Indiana which is here attacked because it is asserted that it devested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others. Indeed, the entire argument upon which the attack on the statute must depend involves a dilemma, which is this: If the right of the collective owners of the surface to take from the common fund, and thus reduce a portion of it to possession, does not create a property interest in the common fund, then the statute does not provide for the taking of private property without compensation. If, on the other hand, there be, as a consequence of the right of the surface owners to reduce to possession, a right of property in them in and to the substances contained in the common reservoir of supply, then, as a necessary result of the right of property, its indivisible quality, and the peculiar position of the things to which it relates, there must arise the legislative power to protect the right of property from destruction. To illustrate by another form of statement the argument is this: There is property in the surface owners in the gas and oil held in the natural reservoir. Their right to take cannot be regulated without devesting them of their property without adequate compensation, in violation of the Fourteenth Amendment, and this although it be that if regulation cannot be exerted one property owner may deprive all the others of their rights, since his act in so doing will be *damnum absque injuria*. This is but to say that one common owner may devest all the others of their rights without wrongdoing, but the lawmaking power cannot protect all the owners in their enjoyment without violating the Constitution of the United States.

These considerations are sufficient to dispose of the case. But as there are several contentions which seem to have been

considered, in argument, as resting on different premises, though such in reason is not the case, we briefly notice them separately: First. It is argued that as the gas, before being allowed to disperse in the air, serves the purpose of forcing up the oil, therefore it is not wasted, hence is not subject to regulation. Second. That the answer averred that the defendant was so situated as not to be able to use or dispose of the gas which comes to the surface with the oil; from which it follows that the gas must either be stored or dispersed in the air. Now, the answer further asserted that when the gas is stored and not used, the back pressure, on the best-known pump, would, if not arresting its movement, at least greatly diminish its capacity. Hence it is said the law by making it unlawful to allow the gas to escape made it practically impossible to profitably extract the oil. That is, as the oil could not be taken at a profit by one who made no use of the gas, therefore he must be allowed to waste the gas into the atmosphere, and thus destroy the interest of the other common owners in the reservoir of gas. These contentions but state in a different form the matters already disposed of. They really go, not to the power to make the regulations, but to their wisdom. But with the lawful discretion of the legislature of the state we may not interfere.

In view of the fact that regulations of natural deposits of oil and gas and the right of the owner to take them as an incident of title in fee to the surface of the earth, as said by the supreme court of Indiana, is ultimately but a regulation of real property, and they must hence be treated as relating to the preservation and protection of rights of an essentially local character. Considering this fact and the peculiar situation of the substances, as well as the character of the rights of the surface owners, we cannot say that the statute amounts to a taking of private property, when it is but a regulation by the state of Indiana of a subject which especially comes within its lawful authority.

Affirmed.

BOSTON & MONTANA CONSOLIDATED COPPER AND SILVER MINING CO. v. MONTANA ORE PURCHASING CO.

(24 Montana 117; 60 Pac. 807. Supreme Court. April 18, 1900.)

An insignificant technical violation of an injunction will not be punished as a contempt, where the violation was not with any intention to disobey the injunction.

Misunderstanding of orders. Where defendant's foreman was instructed to run a drift westerly, but through misunderstanding his orders, ran it in an easterly direction upon plaintiff's mining ground and extracted a small quantity of ore therefrom, there was a technical violation of the injunction, which might be punished by a nominal fine.

Charging guilt by inference. Courts will not punish as for contempt where the allegations charge merely by argument and inference that defendant is guilty of the acts charged.

Where the violation is willful, the facts sufficiently charged and the proof clear, the enjoined parties should expect no lenity.

Action by the Boston & Montana Consolidated Copper & Silver Mining Company against the Montana Ore Purchasing Company. Application for punishment for violating injunction. Dismissed.

WM. H. DE WITT and T. J. WALSH, for applicant.

MCHATTON & COTTER and ROBT. B. SMITH, for respondent.

Insufficient case of alleged violation by defendant fouling water. *Woodruff* v. *North Bloomfield Co.*, 45 Fed. 129.

Practice on injunction and contempt proceedings against nonresident parties. *Mexican Co.* v. *Mexican Co.*, 47 Fed. 351.

An entry to post notice and perfect a location is not in contempt of an injunction against mining. *Harley* v. *Montana Co.* 27 Mont. 388; 22 M. R. —.

See *Silver Peak Mines* v. *Hanchett*, 20 M. R. 19 and notes.

PER CURIAM. On motion of the plaintiff, based upon certain affidavits filed therewith, this court required the defendant to show cause why it should not again be punished (see *State* v. *Montana Co.*, 22 Mont. 352, 56 Pac. 1134), as for a contempt, because of its supposed violation of certain injunction orders issued on the 2d day of March, 1899. The defendant appeared on the 11th day of April, 1900, and moved the quashal of the order and the dismissal of the proceedings upon the ground that the affidavits were insufficient, and failed to state facts constituting a contempt by it. This motion the court took under advisement, and ordered the hearing to be proceeded with, the defendant objecting to the introduction of any evidence therein. Testimony was then introduced in support of the proceeding, and by the defendant in its behalf.

The evidence adduced for the purpose of establishing a disobedience of the orders of this court fails clearly to satisfy us of a violation of them by the defendant, except in two respects, to wit, the encroachment by the defendant upon the Pennsylvania ground in the No. 26 and No. 29 drifts. In the 26 drift only enough ground was moved to place a set of stoping timbers, and this was done without any design to disobey the injunction. The encroachment was insignificant. We do not regard this merely technical violation as sufficient cause for punishment. In the No. 29 drift, 26 feet were run. Why this happened to be done by the defendant was explained by one of its engineers, who testified that he directed the foreman to run the drift "westerly," but by mistake the foreman understood him to say "easterly." The error was not discovered until the drift had been run 26 feet, and timbered, when it was immediately stopped by the defendant, and the drift run westerly. The ore taken from that part of the Pennsylvania mine was of small commercial value, being worth little, if any, more than the cost of the labor of extracting and smelting it. This trespass was committed in May,

1899. It constituted a violation of the order of this court. Plaintiff knew of such violation, but refrained from making complaint thereof until the present proceeding was instituted, on the 26th day of March, 1900. Nearly 10 months' delay in bringing it to our attention justifies the belief, under all the circumstances disclosed, that the plaintiff itself did not feel that the violation was a willful or serious transgression of the injunction order. After considering the evidence with respect to this drift, we think it establishes a careless mistake or blunder on the part of the engineer or foreman of the defendant company, for which it is now answerable if the affidavits, or any one of them, contain a sufficient allegation of a contempt by the defendant in this particular; and, if the charge be sufficient, we should regard such disobedience as calling for the imposition of a nominal fine; but we are of the opinion that there is no allegation in the affidavits, or in any of them, which, if true, fastens upon the defendant, as a matter of law, the doing of the act. The affidavits upon which the motion for an order to show cause is founded are by no means as direct in their averments as they should be. One who would charge a contempt should aver directly that the particular acts constituting contempt were done by the defendant. In this proceeding, for example, if certain ore in sacks was taken by the defendant in violation of the order of the court, the affidavits should so state, instead of charging argumentatively that the defendant took the ore by stating that it was not taken by the plaintiff or the plaintiff's agents, and was not taken by another corporation which had access to the place where the ore was stored. Argumentative affidavits, in which the affiant endeavors to reason out a charge of contempt by exclusion, will not serve as foundation for an inquiry which involves the liberty of persons. The following averments contained in the affidavit of Davis, an engineer in the employ of the plaintiff company, are fair examples of those found in the other affidavits: "That after the order of

this court was made, punishing the defendant for contempt, and during the month of May, 1899, all of drift 29 that is east of a crosscut from the Rarus lode claim was driven in Pennsylvania ground covered by said injunction, and ore was extracted and removed from said drift and from said Pennsylvania lode claim, and hoisted through the shafts of the defendant, and that said drift 29 is not any portion of any work that was allowed by this court to be done under a modification of said injunction; that said work last described, and said extraction of ore, was not done by the plaintiff herein or the Butte & Boston Consolidated Mining Company." This falls far short of a statement that the encroachment or the extraction of the ore was the act of the defendant. The averment, although true, does not implicate the defendant in, or connect it with the doing of, any prohibited act. There should be some direct charge made, either positively or upon information and belief, that the defendant committed an act constituting a contempt. Other affidavits, containing statements of the evidence in support of such charge, would be proper for the consideration of the court upon the application for an order on the defendant to show cause why it should not be punished as for a contempt. It seems obvious that, where the facts stated in the affidavits are consistent with the innocence of the defendant, there is no charge against it which is able to withstand an attack made in due season. It is not enough that the affidavits contain evidentiary matters from which may be inferred the guilt of the defendant. The order to show cause and the proceeding must be dismissed.

We deem it not improper, however, to remark that, while upon slight evidence we shall not reach out to infer willfulness or intended disregard of our orders by those whose especial duty it is to obey and respect them, yet the disposition of the court is to punish severely, where the proof is clear of any willful violation or disregard of its injunction

orders, and persons or corporations enjoined need expect no lenity when the disobedience of its mandates is willfully committed, and proof is forthcoming, under a sufficient charge, that it has been so done. For the reason that there is no sufficient affidavit upon which the order to show cause or the proceeding may rest, the order is vacated, the defendant is discharged, and the proceeding is dismissed.

Dismissed.

THE COSMOPOLITAN MINING CO. v. LOTTIE FOOTE ET AL.

(101 Federal 518. U. S. Circuit Court, District of Nevada. April 23, 1900.)

Location of discovery vein across strike. Other lode parallel to side lines. When a location has been made upon a vein across instead of along the strike of the vein discovered the side lines become the end lines. Such claim has no extralateral rights and the later finding of another vein having a course parallel to the side lines does not aid the contention to pass such sides lines.

In Equity. Suit to determine rights of owners of adjoining mining claims.

W. E. F. DEAL, for complainant.

TORREYSON & SUMMERFIELD, for defendants.

HAWLEY, District Judge. Complainant is the owner of the Cosmopolitan patented mining claim, 1,000 feet in length and 600 feet in width, situate in Gold Hill mining district, Storey county, Nev. The patent was issued in October, 1873. Defendant Lottie Foote is the owner of a mining claim and location situate in the same mining district, immediately west

The extralateral rights of all veins must be determined by the same end lines. *Walrath* v. *Champion Co.*, 63 Fed. 553. *St. Louis Co.* v. *Montana Co.* 104 Fed. 664; 21 M. R. —. See *Ajax Co.* v. *Hilkey*, 31 Colo. 131; 72 Pac. 447.

The end-lines of the discovery vein are end-lines of all veins within the surface boundaries. *Jefferson Co.* v. *Anchoria Co.*, — Colo. —; 75 Pac. 1070.

Where there are two conflicting lode locations, each having a portion of the apex of the same vein and there is a conflict with reference to their dip rights, the senior location prevails. *Id.*

The issue of a patent to a lode claim raises a presumption that it has an apex of a lode within its lines. *Iron S. Co.* v. *Campbell*, 17 Colo. 272.

of the Cosmopolitan, and called the "Badger." There is no controversy in relation to the surface lines of the Cosmopolitan claim. The complainant claims that there is a lode bearing mineral in the Cosmopolitan claim near its westerly side line, having a northerly and southerly course, with a dip to the east, and that the apex of this lode is within the Cosmopolitan surface location, except for a distance of a few feet, where a very small part of it extends over the surface line into the Badger from 5 to 15 feet, more or less. The lode, as claimed by complainant, is in two branches at the southerly end, each branch being from 30 to 50 feet wide, and which, going north, unite in one vein, from 60 to 100, or more, feet wide. The defendants claim that there is a lode near the east side line of the Badger, having its course north and south along the entire length, with a hanging and foot wall, wholly within the Badger surface lines. The contest between the parties is in relation to the apex of the respective lodes, and upon that question a mass of evidence has been submitted by the respective parties. There is a decided conflict in the evidence upon this point.

In the year 1875 some work was done by the complainant in running an upper and lower tunnel into the Cosmopolitan ground. The mouth of the upper tunnel commenced near a point where a blacksmith shop was afterwards erected, about 100 feet southwesterly from the southwest corner of the Cosmopolitan claim. This tunnel runs in a northeasterly direction a distance of about 400 feet through the Cosmopolitan claim. At a point about 100 feet from its face the tunnel makes a turn, and runs more in a northwesterly direction. This tunnel was constructed by the complainant. Leases and licenses were at different times from 1894 to 1898 given to different parties to work therein and take ore therefrom. The rails in the tunnel, and cars to convey the ore, were supplied and paid for by the complainant. During the years 1895 and 1896 the Footes, father and sons, made several applica-

tions to Mr. Landers, the president of the Cosmopolitan Company, for the privilege of taking ore out of the Cosmopolitan claim through this tunnel. None was ever given them. Mr. Staricha in 1895, under a lease from complainant, extended the tunnel and took out ore from the stope called the "Staricha Stope," distant about 100 feet from the southerly line of the Cosmopolitan mine. In 1896 an incline from this stope was opened out to the surface, and came out near to, but west of, the westerly line of the Cosmopolitan claim. Around this stope and incline, and the character of the earth, rock, and other material found therein, cluster the most important facts upon which each of the parties relies to prove where the apex is found. In 1898 the defendants entered into the tunnel, took possession thereof, and excluded complainant therefrom, and at or near the face thereof stoped out a large quantity of ore, and were so engaged at the time of the commencement of this suit, and continued to work thereon for some time thereafter. At the trial the contention of the defendants was that the ore thus taken out belongs to a lode which has its apex within the surface lines of the Badger claim, and that they have the right to follow said lode in its downward course into the Cosmopolitan ground, although there may have been a mistake made in locating the ledge.

The Badger is a relocation, made in 1884. The notice of relocation reads as follows:

"Location Notice. Badger Mine.

"Notice is hereby given that I, the undersigned, have this day relocated 1,000 feet of the south end of the Badger mine & 500 feet of the north end of the Margarita mine, in Storey county, Nevada, for mining purposes. This location is made subject to the mining laws of the United States and the state of Nevada. My residence is Silver City, Lyon county, Nevada, and am a citizen thereof. The said mine is situated in Negro ravine, adjoining the Flora Temple on the north, and west of the Cosmopolitan mines. July 14th, 1884. This claim shall be known as the 'Badger Mine.' George Foote."

At the time this location notice was posted there was a lode

exposed within the surface lines of the location, running in an easterly and westerly direction. The rights of the defendants are based solely upon this relocation. If it was made upon a lode running in an easterly and westerly direction, then the side lines marked on the surface as such would become, in the eye of the law, the end lines of the location, and the end lines marked on the surface would become the side lines of the claim. The testimony concerning the relocation is very meager. Mr. Foote testified: That he made the relocation on a lode running in a northerly and southerly direction. That he placed the location notice at or near the center of the surface claim, and at a point marked "O" on the map. That ore was disclosed at that point. That there was a hole dug about 350 feet northerly from that point, which disclosed ore, and another one at a point about 750 feet southerly from the location point. At the point of location there is a cut 6 or 7 feet long, 2 feet wide, and 1 foot deep in vein matter. The hole towards the north line of the Badger is an opening 5 feet wide and 15 feet in length, in which ore is exposed. The hole towards the southern line of the Badger is 2 feet square and 1 foot deep, and is in solid country rock. The testimony in rebuttal was to the effect that the character of the ground between the hole at the north and the location point was in solid country rock. The witness Wrinkle said: Part of the country "is covered by surface dirt, but quite a large stretch is exposed, and it is solid country rock." The same is true of the ground between the location point and the hole at the southerly end of the claim. The witness said, "Wherever the ground is laid bare,—no surface dirt covering it,—it is nothing but country rock." The same witness, speaking with reference to the explorations in the Badger tunnel, testified as follows:

"Q. State whether or not any other vein appears in that tunnel, except the one that you have shown on the map,—any vein running northerly and southerly. A. No; there is not. * * * Q. State

whether or not any vein running northerly or southerly is shown in that tunnel. A. No. Q. What indications are there, if any, on the surface between the opening shown to you near the north line, 200 feet from it, and the location point, or the location point and the opening 150 feet or so from the south line of the Badger,—what indication between those points of any vein whatever? A. There are none."

There are surrounding circumstances in connection with the testimony upon this point as to the course of the lode that ought not to be overlooked. No attempt was made upon the part of the defendants, except by the testimony of Mr. Foote, to establish the fact of the existence of any lode running northerly and southerly from the location point, which was and is of as much importance as the establishment of the existence of a lode running in that direction near the easterly line of the Badger claim. There is no pretense that the relocation was made upon the lode in dispute at the easterly line of the Badger location, or that there is any possible connection between that lode and the one located by Mr. Foote.

The defendants' contention seems to be that because, as they claim, they have subsequently discovered the apex of a lode running northerly and southerly at the easterly line of their surface location, they have a right to follow that lode in its dip underneath the Cosmopolitan claim, without any regard to the direction or course of the lode located by Mr. Foote. But that right, in law depends upon the fact whether what are marked on the ground as the side lines of the location are in fact the side lines; and to determine that question we must look exclusively to the location, and find out what the defendant Foote located, because, if he located upon a lode that he thought had a northerly and southerly course, and made his relocation accordingly, and the subsequent developments proved that the locator was mistaken in the course of the lode, he would be bound by his own mistake, and governed and controlled in his rights by the facts as they are shown to exist, instead of what he thought existed at the time the loca-

tion was made. The testimony given by the locator is wholly insufficient to show that any lode, ledge, or vein had been discovered by him, or the prior locators of the ground, having a northerly or southerly course at the point of location. When the entire testimony is taken into consideration, it is made manifest that no such ledge exists, or at least that none has ever been discovered. The point of the relocation where the notice was posted was near to a well-defined lode, called by some of the witnesses the 'Badger,' and by others the 'Margarita,' which has a course clearly defined in an easterly and westerly direction, and upon which the Footes have been at work for years. No claim that his location was made upon a lode running north and south seems ever to have been made by the locator prior to the time of the trial, nor until after complainant's counsel had publicly stated that the relocation of the Badger was made upon a lode running east and west, and that the locator's side lines would be his end lines, and cut off his extralateral rights in that direction. Foote testified that he had never informed his counsel to that effect, nor had he given any such information to the surveyor employed by the defendants. But, whatever his claim may have been,—whatever his intentions were,—the fact remains that the relocation was absolutely made upon a lode which runs more east and west than north and south; and the law steps in and declares that his legal rights under this location must be determined by calling what he marked as the side lines the end lines of his location. This being true, it follows that he is not entitled to any extralateral rights beyond his end line along the western side line of the Cosmopolitan. The law upon this point is well settled. The principles which govern and control this question were first announced by the supreme court in *Mining Co.* v. *Tarbet,* 98 U. S. 463, 25 L. Ed. 253, affirmed in *Argentine M. Co.* v. *Terrible M. Co.,* 122 U. S. 478, 485, 7 Sup. Ct. 1356, 30 L. Ed. 1140, and followed in *Del Monte Co.* v. *Last Chance Co.,*

171 U. S. 55, 86, 89, 18 Sup. Ct. 895, 43 L. Ed. 72, and *Walrath* v. *Mining Co.*, 171 U. S. 293, 307, 18 Sup. Ct. 909, 43 L. Ed. 170. See also *Iron Silver M. Co.* v. *Elgin M. & S. Co.*, 118 U. S. 196, 208, 6 Sup. Ct. 1177, 30 L. Ed. 98; *King* v. *Mining Co.*, 152 U. S. 222, 228, 14 Sup. Ct. 510, 38 L. Ed. 419; *Cons. Wyoming M. Co.* v. *Champion M. Co.*, (C. C.) 63 Fed. 540, 548; *Walrath* v. *Mining Co.*, (C. C.) 63 Fed. 552, 557; 2 Lindl. Mines, § 586 et seq. Numerous other authorities will be found cited in the cases here referred to.

In *Argentine M. Co.* v. *Terrible M. Co., supra,* the court in discussing this question, said:

"When, therefore, a mining claim crosses the course of the lode or vein, instead of being 'along the vein or lode,' the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface. Such is the purport of the decision in *Mining Co.* v. *Tarbet*, 98 U. S. 463, 25 L. Ed. 253. The court there said, referring to the statute of 1866 (14 Stat. 251) and that of 1872 (17 Stat. 91): 'We think that the intent of both statutes is that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable, and that the end lines are to cross the lode and extend perpendicularly downward, and to be continued in their own direction either way horizontally, and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines correspond substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of the vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode.' And again that the end lines of the claim, properly so called, are 'those which are crosswise of the general course of the vein on the surface.' Such being the law, the lines which separate the location of the plantiff below from the locations of the defendant are end lines, across which, as they are extended downward vertically, the defendant cannot follow a vein, even if its apex or outcropping is within its surface boundaries, and, as a

consequence, could not touch the premises in dispute, which are conceded to be outside of those lines, and outside of vertical planes drawn downward through them."

In *Cons. Wyoming M. Co.* v. *Champion M. Co.* (C. C.) 63 Fed. 540, 548, I said:

"The statute should be so construed as to give to the locator what he actually locates,—no more and no less. * * * He is admonished by the law that he will be limited in the length of his lode upon its strike to such portion as is within the surface lines of his location, but he is at the same time assured that he will not be limited or deprived of his extralateral rights as to the depth of such lode, upon its dip, the apex of which is within the surface lines of his location. The statute of 1872 gives to locators of mining claims 'the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' These are their extralateral rights, which should neither be extended nor restricted by the courts. * * * One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be to preserve in all cases the essential right given by the statute to follow the lode upon its dip, as well as upon its strike, to so much thereof as its apex is found within the surface lines of the location. If the lode runs more nearly parallel with the end lines than with the side lines as marked on the ground as such, then the end lines of the location must be considered by the courts as the side lines meant by the statute. If the lode runs more nearly parallel with the side lines than the end lines, then the end lines, as marked on the ground, are considered by the court as the end lines of the location. In both cases the extralateral rights are preserved and maintained as defined in the statute."

Still more directly in point are the views expressed by myself in *Walrath* v. *Mining Co.* (C. C.) 63 Fed. 552, 557:

"The act of 1872, in granting all other veins that were within the surface lines of previous locations, did not create any new lines for such other veins, nor invest the court with any authority to

make new end lines for such other veins. And it is apparent from an examination of the statute that the court has no power to make a new location for every vein that may be found within the surface lines of the location, and thereby enlarge the rights of the original locators. When the end lines of a mining location are once fixed, they bound the extralateral rights to all the lodes that are thereafter found within the surface lines of the location. It necessarily follows that the end lines of the Providence [Badger] survey must be considered by the court as the end lines of any and all other lodes or veins which lie 'inside of such surface lines'; otherwise, endless confusion would arise in the construction of the statute. End lines would have to be constructed in different directions if the separate lodes or veins found within the surface lines did not run parallel with each other, and the result would be that these lines, extended, might give to the owner of the claims a greater length along the lode as it extended downward than they had upon the surface."

These views are conclusive as to the present controversy between the parties. They apply as well to the "dumping ground" claimed by the complainant as to the lode within the surface boundaries of the Cosmopolitan claim. The owner or owners of the Badger claim, under the location made by Mr. Foote, can only claim 300 feet on each side of the middle of the lode located by him; and, as thus limited, it does not reach any part or portion of the dumping ground of the Cosmopolitan Company. They are, of course, entitled to all lodes, ledges, veins, and deposits of mineral-bearing rock, earth, or ore, the apex of which is found within the limits of the Badger location as herein defined, but they are confined in such rights to the end line drawn downward vertically along the westerly side line of the Cosmopolitan claim. Beyond that they have no right to go.

In the light of these conclusions, it is unnecessary for the court to travel over the surface ground, pass through the tunnels, go up the stopes or down into the winzes, through the drifts and into the cuts and holes, visit the dump, or inspect the croppings, and then test and weigh the credibility, strength, and reasonableness of the testimony of the various

witnesses by legal scales, for the purpose of determining the mooted question as to the existence or non-existence of a lode having its apex within the surface lines of the Badger claim west of and near to the Cosmopolitan westerly side line.

Let a decree be entered in favor of complainant.

MONTANA MINING CO., LTD. v. ST. LOUIS MINING & MILLING CO. OF MONTANA.

(102 Federal 430. Circuit Court of Appeals, Ninth Circuit. May 14, 1900.)

[1]**Dip rights. Effect of sweeping clause.** In compliance with a decree for specific performance of a contract made between the owners of two adjoining mining claims in settlement of a suit brought to determine a disputed boundary between them, the owner of one claim conveyed to the owner of the other the strip in dispute, "together with all the mineral therein contained, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock, and earth therein." *Held*, that such conveyance had no other effect than to fix the surface boundary between the two claims in accordance with the original contention of the grantee, and did not deprive the grantor of any extralateral rights under the ground so conveyed; such boundary being a side line of its claim.

Action for conversion of ore. Pleading. A complaint which alleges that plaintiff is the owner of a mining claim, and of all the precious metals contained in any vein or lode, through its entire depth, whose apex is within the surface lines of such claim, and that defendant, the owner of a claim which adjoins one of the side lines of plaintiff's, has mined and removed ore from a vein which has its apex in plaintiff's claim, is sufficient, in the absence of a demurrer thereto, to support a judgment in favor of plaintiff for the conversion of such ore, although it does not specifically allege the facts which show that the boundary between the claims of the parties is a side line of plaintiff's claim, beyond which it has extralateral rights.

[2]**Possession of the surface of a mining claim is possession of a vein or**

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[1] *Stinchfield* v. *Gillis*, 17 M. R. 497. *Boston Co.* v. *Montana Co.*, 20 M. R. 492.

After enumerating several minerals by name the grant of an act contained a sweeping clause of all "mines, minerals and substances whatsoever:" *Held*, that the grant did not cover gold mines. *Esquimault Co.* v. *Bainbridge*, L. R. App. Cases (1896) 561.

Construction of deed as to apex rights modifying same case as previously reported. 27 Mont. 288; 70 Pac. 1114. *Montana Co.* v. *Boston Co.* 27 Mont. 536; 22 M. R. —.

[2] A surface possession prior in time is prior in right as against a subsequent underground trespass by tunnel. *Lincoln Co.* v. *Hendry*, 9 N. M. 149; 50 Pac. 330.

lode having its apex within the surface lines of the claim, although, in extending downward, such vein may pass beyond the vertical side lines of the claim, and will support an action of trespass for the removal of ore from such vein, beneath the surface of an adjoining claim.

Ore stored under order of Court. Where, in an action for the conversion of ore, an injunction has been issued, in compliance with which the defendant has stored certain ore theretofore mined, it is not entitled to have the value of such ore taken into account in reduction of damages unless it proves such value, and returns or tenders the ore to the plaintiff.

In error to the Circuit Court of the United States for the District of Montana.

CHAS. J. HUGHES and CULLEN, DAY & CULLEN, for plaintiff in error.

ARTHUR BROWN, THOMAS C. BACH, E. W. TOOLE, and H. P. HENDERSON, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error, the St. Louis Mining & Milling Company of Montana, was the plaintiff in an action brought against the plaintiff in error, the Montana Mining Company, Limited, for trespass and conversion of ore which was alleged to have been taken from the plaintiff's mine by the defendant in the action. The plaintiff in the action owned the St. Louis mining claim, and the defendant owned the Nine Hour mining claim, which adjoined it on the east. The principal contention in the case concerns the construction to be given to a conveyance which was executed by the owners of the St. Louis claim to the owners of the Nine Hour claim. The conveyance was made to settle a controversy that had arisen concerning the easterly boundary line of the St. Louis claim. That was the older of the two

claims. At the time of applying for a patent the locators thereof included in their survey a portion of the premises which were claimed by the owners of the Nine Hour claim. The latter made an adverse claim, and brought an action thereupon. Before the cause came for trial the suit was compromised. It was agreed that, as soon as patent was obtained to the St. Louis claim, the owners thereof would convey back to the owners of the Nine Hour claim the strip of land which was in controversy,—a strip 30 feet wide, to be described by metes and bounds,—"together with all mineral therein contained." The owners of the St. Louis claim, having obtained the patent, refused to make the conveyance. Suit was brought by the owners of the Nine Hour claim for specific performance of the contract.[1] In the complaint in that suit it was alleged that the contract had been made "for the purpose of settling and agreeing upon the boundary line between the said Nine Hour lode-mining claim and the said St. Louis mining claim." A decree was rendered in the suit in favor of the plaintiff therein, and in pursuance thereof a conveyance was executed by the St. Louis Mining & Milling Company, the defendant in error here, conveying to the Montana Mining Company, Limited, the 30-foot strip, by metes and bounds, "together with all the mineral therein contained, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz rock, and earth therein," etc. It was shown upon the trial of the case at bar that in the St. Louis claim there are two veins, —one, the discovery vein, running through the claim from end to end, northerly and southerly, and dipping to the east; and a second vein apexing for a long distance within the claim, and dipping easterly underneath the Nine Hour claim, a portion thereof dipping underneath the premises which were conveyed by the deed above referred to. The question involved in the suit is the ownership of the ores of said second

[1] 19 M. R. 218.

vein, which lie beneath the said conveyed premises, and of which the apex of the vein which carries the same lies entirely within the St. Louis claim.

It is contended by the plaintiff in error that by the deed above referred to there was conveyed to it, from the owners of the St. Louis claim, title to all the ores lying beneath the surface of the strip of land therein described, and lying eastward of a vertical plane extended downward on the division line so created between the two claims. We are unable to assent to this contention. In interpreting the conveyance in question, regard must be had, not only to its terms, but to the subject matter involved and the surrounding circumstances, in order to ascertain the intention of the parties. Said the court in *Richmond M. Co.* v. *Eureka M. Co.*, 103 U. S. 846, 26 L. Ed. 560, "The language used is to be construed with reference to the peculiar property about which the parties were contracting." The court, in the light of the circumstances of that case, held that a line "continued downward to the center of the earth was not a vertical plane, but must be construed as extending the boundary line downward through the dips of the veins or lodes wherever they might go in their course toward the center of the earth." The controversy between the owners of the St. Louis and Nine Hour claims was one which involved surface lines only. No dispute had arisen concerning the ores beneath the surface. The owners of the Nine Hour claimed nothing more than that the eastern side line of the St. Louis, as it was surveyed, encroached upon their territory. They based their adverse action upon that contention. The compromise was an admission that their claim was just. When the suit was brought for the specific performance of the compromise contract, it was brought by the successors in interest of those who had represented the Nine Hour claim at the time of the compromise. The plaintiffs therein were not the assignees of the contract. They maintained the suit solely as owners of

the Nine Hour claim, and upon the theory that the strip of land so contracted to be conveyed was a portion of the Nine Hour claim. All these antecedent circumstances leading up to and culminating in the deed are properly considered in determining what was the intent of the parties to the contract. If the adverse action which was brought by the owners of the Nine Hour claim had gone to trial, and had resulted in a judgment fully sustaining their contention, the result would have been to fix a surface line of division between the two claims, without affecting rights to the ores beneath the surface otherwise than as they are controlled by the mining laws of the United States. The owners of the St. Louis claim would still have retained the right to follow their vein extralaterally in its dip beneath the surface of the strip of land which was the subject of the conveyance. Upon what theory can it be said that the owners of the Nine Hour claim acquired more by the conveyance which was made to compromise the action than they could have acquired by a judgment in the action itself, fixing the boundary upon the very line which they contended was the true line? It is not to be supposed that the owners of the St. Louis claim intended, by the compromise contract, not only to surrender the whole of their contention concerning the true location of the boundary line, but also to divest their claim of its extralateral rights,—rights that had not been in litigation, and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit. The use of the words "together with all the minerals therein contained" is not sufficient. Those words so inserted in the contract and in the deed are not more inclusive or more significant than the words universally employed in grants of mining claims, "together with dips, spurs, angles, and also all the metals, ores, etc., therein." Counsel for the plaintiff in error rely upon two decisions which, it is said,

favor the construction which they contend for,—the *Eureka Case,* 4 Sawy. 302, Fed. Cas. No. 4,548, and *Stinchfield* v. *Gillis,* 107 Cal. 86, 40 Pac. 98. In the first case two owners of several adjoining claims had fixed and agreed upon a line running northerly for a fixed distance, which should be a division between the claims. It was not a line running with the strike of the vein, but across it. Thereafter a controversy arose concerning the right to mine the ores of the vein at a point beneath the surface further north than the line of division extended. The court held that the line so arbitrarily adopted must be projected as far as the lode extended, and must necessarily divide all that the location upon the surface carried. In that case the parties to the agreement had, by the terms thereof, made so clear their intention to divide their claims by a vertical plane, and to confine their mining rights to either side thereof, that there was no room for construction. In the case of *Stinchfield* v. *Gillis* it was held that if the locator of a mining claim should convey a portion of his claim by metes and bounds, without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within the ground conveyed, in any vein whose apex was within the surface lines of his deed. Said the court (page 90, 107 Cal., and page 100, 40 Pac.), "All that we hold is that inasmuch as the gold in question was within the ground conveyed by Gillis to the plaintiff, and in a vein whose apex was within the surface lines of that ground, it belonged to the plaintiff." We do not see that either case affords light upon the proposition involved in the case at bar. Upon consideration of all the circumstances, we entertain no doubt that it was the purpose of the contracting parties to fix a boundary line between the two mining claims, reserving to each claim the right that would have attached if the boundary line had been settled without controversy; and the language of the contract and of the deed sustains that conclusion.

It is earnestly contended that the complaint does not state

a cause of action, for the reason that it appears therefrom that the vein which the defendant in error claims the right to pursue under the surface so conveyed to the plaintiff in error is not the discovery vein, and that there is no allegation that the discovery vein runs in any particular direction, or that its strike would intersect the end lines, or that it runs lengthwise of the claim, rather than across, or that it dips in any given direction, and that for want of these allegations the complaint wholly fails to show a right in the defendant in error to pursue beyond its vertical side lines the vein from which the ores in controversy were taken. It is true that the complaint does not mention the direction of the discovery vein or its dip. It contains the allegation, however, that the defendant in error is the owner of, and in the possession of, the St. Louis quartz lode-mining claim, "and of the quartz, rock and ore and precious metals contained in any and all veins, lodes, and ledges of mineral-bearing rock, through their entire depth, the tops or apices of which lie within the surface lines of the said fractional portion of said St. Louis lode-mining claim." It describes the mining claim by metes and bounds, and shows that it is about 1,500 feet in length by nearly 600 feet in width. The description closes with these words: "Said lots, Nos. 54 and 55A, extending 1,500 feet in length along said St. Louis vein or lode." It alleges that the strip of land beneath the surface of which the ores in controversy were mined lies east of the east side line of the claim. It alleges that the dip of one of the veins, having a portion of its apex inside of the surface of the St. Louis claim, is to the east, and dips under and beneath the 30-foot strip of the Nine Hour claim, and proceeds to allege that from said vein so apexing within the St. Louis claim, and extending beneath the Nine Hour claim, the ores in controversy have been taken by the plaintiff in error. No motion or demurrer was filed to the complaint, but the plaintiff in error answered upon the merits.

In *Walrath* v. *Champion M. Co.*, 63 Fed. 557, this court said:

"The act of 1872, in granting all other veins that were within the surface lines of previous locations, did not create any new lines for such other veins, nor invest the court with any authority to make new end lines for such other veins. * * * When the end lines of a mining location are once fixed, they bound the extralateral rights to all the lodes that are thereafter found within the surface lines of the location."

In *Del Monte M. Co.* v. *Last Chance M. Co.*, 171 U. S. 89, 18 Sup. Ct. 908, 43 L. Ed. 86, it was said:

"Our conclusions may be summed up in these propositions: First. The location as made on the surface by the locator determines the extent of rights below the surface. Second. The end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third. Every vein, 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. Fourth. The only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike, is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines."

Upon the expressions of the supreme court, just quoted, and upon the assumption that the locator of a mining claim has, unless the contrary be shown, complied with the law in locating his claim, the defendant in error contends that the presumption arises that the discovery vein in this instance runs lengthwise with the claim, and not across the same. This contention it is unnecessary here to consider. We find in the complaint the distinct allegation that the defendant in error

owns all the precious metals contained in any vein or lode of mineral-bearing rock, through their entire depth, whose apex is within the surface of the St. Louis quartz lode-mining claim, and the further averment that the ores in controversy were mined from a vein which so apexes within the surface of the claim. These averments are sufficient to show that a cause of action existed, and are sufficient to sustain the judgment.

It is contended that the court erred in refusing to instruct the jury, at the request of the plaintiff in error, that the defendant in error was not in such possession of the vein as to maintain the action of trespass. It is urged that the possession of the apex of the vein in the surface of the St. Louis claim was not the actual possession of the vein, as it extended beneath the surface of the Nine Hour claim. We are able to discover no reason why the actual possession of the surface of a mining claim does not extend to all that belongs to the claim. Such a possession is not constructive, but actual. Said the court in *Mining Co.* v. *Cheesman,* 116 U. S. 533, 6 Sup. Ct. 483, 29 L. Ed. 713:

"It is obvious that the vein, lode, or ledge of which the locator may have 'the exclusive right of possession and enjoyment' is one whose apex is found inside of his surface lines extended vertically; and this right follows such vein, though in extending downward it may depart from a perpendicular, and extend laterally outside of the vertical lines of such surface location."

In *Pardee* v. *Murray,* 4 Mont. 234, 2 Pac. 16, it was held that possession of the surface is possession of all veins or lodes whose apices are within such surface lines. Said the court (page 277, 4 Mont., and page 17, 2 Pac.):

"The possession of the respondent was sufficient to maintain this action. * * * Possession of the surface of a mining-claim location is possession of all veins, lodes, and ledges, the tops or apices of which are inside the surface lines, although such veins, lodes,

and ledges, as they go downward, may extend outside such surface lines."

The case of *Hugunin* v. *McCunniff*, 2 Colo. 367, cited by the plaintiff in error, does not sustain his contention. In that case the defendants had conveyed a mine, and delivered a shaft and level in the mine to the vendor of the plaintiffs, retaining a certain other shaft and level in the same lode, not connected with the first. The defendants afterwards took ore from the level and shaft, which they retained. In trespass for the ore so taken, it was held that the plaintiffs had not the actual or the constructive possession of the place from which the ore was taken, for the reason that, throughout the length of the level retained by them, the defendants had actual possession, extending to all depths and levels from the surface to the center of the earth.

Error is assigned to the refusal of the court to instruct the jury not to include in their verdict the value of certain ores which had been mined, but which had been stored by the defendant therein, under an injunction issued in the action enjoining it from "disposing of, treating, and reducing any ores heretofore removed or extracted from said premises," for the reason that such ores were held subject to the order of the court, and had not been converted to the use of the defendant. There is nothing in the pleadings or in the bill of exceptions to show that such ores had been returned or tendered to the defendant in error, or in any way accounted for; nor was evidence offered for the purpose of definitely fixing the value of such ore, so that the court could have properly instructed the jury to take the same into account. It was for the plaintiff in error, if he desired to have the value of such ores deducted from the amount of the verdict, to have caused the record to show that the ores were offered to, or were left in the possession of, the defendant in error, and to have submitted evidence of their value. But there is an-

other answer to this contention of the plaintiff in error. Although the instruction which was so requested was refused by the court, it does not appear from the bill of exceptions that the court did not, in its charge to the jury, fully and properly instruct upon that branch of the case. The bill of exceptions does not purport to contain all of the charge of the court. It recites but two instructions, and says that the court, "among other things," so instructed the jury. Considering the whole record and all the assignments of error, we find no ground for reversing the judgment, and it is accordingly affirmed.

A. M. HOLTER HARDWARE CO. v. ONTARIO MINING CO. ET AL.

APPEAL OF CONTINENTAL OIL CO.

(24 Montana 198; 61 Pac. 8. Supreme Court. May 14, 1900.)

No lien for fuel and supplies. Illuminating oil, mica grease, lubricating oil, and gasoline for fuel, used in a mining plant did not enhance the value nor become part of the machinery, and hence were not lienable, within Code Civ. Proc. § 2130, providing that every person furnishing material for any machinery, fixture, or building shall have a lien therefor.

Appeal from District Court, Deer Lodge County; Theo. Brantley, Judge.

Allowed on tools and machinery and on the mine for repairs on the same. *Malone* v. *Big Flat Co.*, 76 Cal. 578; 18 Pac. 772.

Work done for a licensee does not give a lien on the mine. *Eaton* v. *Rocca*, 75 Cal. 93; 16 Pac. 529.

Distribution when some have worked on one mine of a group and others upon another. *Bassick M. Co.* v. *Schoolfield*, 10 Colo. 46; 14 Pac. 65. *Malone* v. *Big Flat Co.*, *supra*.

Several claims worked together liable to lien as one mine. *Treddinnick* v. *Red Cloud Co.* 72 Cal. 78; 13 Pac. 152.

A coal mine is an improvement on land. Coal cars are materials. *Central Co.* v. *Sheffield Co.* 42 Fed. 106.

There can be no lien for material not used. *Bewick* v. *Muir*, 83 Cal. 368; 23 Pac. 389.

Where mortgage is given while materials are being furnished the lien for the materials precedes the mortgage. *Fields* v. *Daisy Co.* 25 Utah. 76; 69 Pac. 528.

Under statute, lien for labor on a mine held to cut out a prior mortgage. *Atlantic Co.* v. *Ropes Co.* 119 Mich. 260; 77 N. W. 938.

An expert has no lien for his examination and report on the mine. *Lindemann* v. *Belden Co.*, 16 Colo. App. 342; 65 Pac. 403.

Superintendent entitled to lien. *Palmer* v. *Uncas M. Co.* 70 Cal. 614; 11 Pac. 666. But only as to labor specially for the mine. *Rara Avis Co.* v. *Bouscher*, 9 Colo. 385; 12 Pac. 433.

A mine overseer is a "person performing labor" and entitled to a mechanic's lien. *McLaren* v. *Byrnes*, 80 Mich. 275; 45 N. W. 143.

Action by A. M. Holter Hardware Company against the Ontario Mining Company and others to enforce a mechanic's lien. From a judgment denying a lien to defendant, Continental Oil Company, it appeals. Affirmed.

F. W. MCINTYRE, for appellant.

MCCONNELL & MCCONNELL, for respondents.

PER CURIAM. This action was brought to foreclose a material man's lien against the defendant Ontario Mining Company; the Continental Oil Company, the appellant, being one of the defendants. This defendant sought to enforce a lien against the real property of the Ontario Mining Company for the price of sundry materials furnished to it between the 1st day of January, 1896, and the 16th day of June, 1896; the claim of lien having been filed on the 31st day of July, 1896. The supposed rights of the Continental Oil Company were contested by the Merchants' National Bank and one Hershfield claiming interests in the property of the mining company by virtue of attachments and executions against it. Upon trial the Continental Oil Company obtained a judgment against the mining company for the amount of its claim of $267.67, with interest, but

One who begins labor before attachment levied has a lien prior to the attachment. *Id.*

Overseer and custodian has a lien. *McLaren* v. *Byrnes*, *supra*. *Contra*, *Griffin* v. *Seymour*, 15 Colo. App. 487; 63 Pac. 809.

Where the manager who was also a director assisted in securing a loan on mortgage without disclosing his assertion of lien for his services he is estopped to question the prior lien of the mortgage. *Sutton* v. *Cons. Apex Co.*, 14 S. Dak. 33; 84 N. W. 211.

No lien for mining supplies furnished generally to a mining company. It must be shown that they were furnished for some specific erection or improvement. *Id.*

As to what parties and estate bound by the lien, see *Hendrie Co.* v. *Holy Cross Co.* 17 Colo. App. 341; 22 M. R. —.

See *Chappius* v. *Blankman*, 20 M. R. 461 and notes.

only $22.68 of that amount, with interest from August 1, 1896, and attorney's fees, was decreed to be a lien upon the real estate of the debtor. The court found that each month's sales were separate and independent accounts, and that the appellant was not entitled to a lien for the value of any materials not furnished within 90 days next before the time when the statement of lien was filed, and that none of the articles are of a lienable nature, except the gasoline for fuel in the assay office in connection with the mill and concentrator. Some of the gasoline had been furnished more than 90 days before the statement of lien was filed. The appeal is from the order denying a new trial, and from so much of the judgment as fails to allow a lien for the whole account.

We find it unnecessary to determine whether or not the account in suit is made up of a series of independent contracts, or whether or not the purchases during each month constitute separate and independent accounts. The articles furnished for which a lien is claimed consist of coal oil for illuminating purposes, mica grease and oil for lubricating purposes, and gasoline used for fuel. We are satisfied that no one of those is of a lienable nature. Each is consumed in use; neither adding to the value, nor becoming parcel, of the property upon which it is used. Section 2130 of the Code of Civil Procedure does not, by any fair construction, include the materials for which a lien is sought to be enforced in the case at bar. The statute creating the right of the material man to acquire a lien is the outgrowth of the principle that he who furnishes that which becomes a constituent part of real property, and is intended to enhance its value, should be given security for the price or worth thereof. The doctrine is well stated by Mr. Justice Brewer, in *Central Trust Co.* v. *Texas & St. Louis Ry. Co.* (C. C.) 23 Fed. 703: "The language of the statute contains the word 'fuel,' in addition to the words 'labor and material'; and it is claimed that the

use of the word 'fuel' enlarges the meaning of the word material,' and makes it broad enough to cover all supplies furnished. But for that word 'fuel,' there would be no question. The idea which underlies these lien statutes is that because the labor and the material have gone into the building of the road or structure, and to that extent added to its value, therefore a lien for such labor and material should be given to him who does the one and furnishes the other. * * * While we may be compelled to follow the language of the statute, and give for the fuel furnished a lien, yet I think in the construction of these statutes we should start from the underlying thought of giving security to him who adds to the value of the road, and that we should never carry the statute beyond that, unless imperatively demanded by the language used." The Wisconsin statute provides that every person who furnishes any materials in or about the erection, construction, protection, or removal of any machinery which is or becomes a part of the freehold, shall have a lien for such materials. In *Standard Oil Co.* v. *Lane,* 75 Wis. 636, 44 N. W. 644, 7 L. R. A. 191, the court said:

"The statute seems to go on the principle that materials used and labor performed on machinery, which enhance its value and become a part of such machinery, should be entitled to a lien. This appears to be the object of the statute. It is clear that it is not everything used in operating machinery, and which tends to preserve it, that is embraced within the meaning of the statute. Many things may serve to preserve machinery and make it operate more efficiently and easily, which do not protect it in the sense of the statute." We affirm the doctrine announced in these cases, as based upon correct principle.

The judgment and order appealed from are affirmed.

Affirmed.

BRANTLY, C. J., being disqualified, takes no part in this decision.

ELCENA DUNCAN v. ALICE I. FULTON ET AL.

(15 Colorado Appeals 140; 61 Pac. 244. Court of Appeals. May 14, 1900.)

An intermediate state court should follow the federal, not the state, construction of the congressional mining acts where their decisions are not in accord.

A miner's second record should be styled an additional, rather than as his amended, location certificate.

[1]**Both certificates to be construed together.** Where the original location certificate which is defective is followed by an additional certificate both should be admitted and if they together furnish a sufficient description and otherwise comply with the law the location is valid.

Description as found from the two. Where an original certificate sufficiently located a discovery shaft, and an additional certificate gave a description by metes and bounds starting with the discovery shaft, and running to posts in mounds of stone, the claim could be identified with certainty from both certificates taken together, and hence such certificates were admissible to establish the locator's claims, though neither, taken alone, sufficiently described such claim.

A tie to a patented mine makes a good description.

Gulch a natural monument. A description in the location certificate of a mining claim that the mine is located in a certain section on top of the mountain south of Dew Drop gulch is sufficient, since such gulch is a natural object or permanent monument.

A locator may swing his claim at will where no conflicting location has intervened.

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[1]See *Murray* v. *Tingley*, 19 M. R. 137, and notes, on the question of relation.

Where there was an invalid location in 1897—location of second party in 1898—relocation by original locator in 1899, the intervening location holds. *Brown* v. *Oregon King Co.*, 110 Fed. 728; 21 M. R. —.

A hostile relocation cannot be made after entry in land office. *Neilson* v. *Champaigne Co.* 111 Fed. 655; 21 M. R. —.

Cancellation of receiver's receipt does not render the ground open to relocation. *Rebecca Co.* v. *Bryant*, 31 Colo. 119; 71 Pac. 1110.

An amended certificate relates back to the first record and cuts out intervening rights except when the boundaries are enlarged. *Morrison* v. *Regan* (Ida.), 67 Pac. 955; 22 M. R. —.

See *Silver City Co.* v. *Lowry*, 20 M. R. 55 and notes.

Appeal from the District Court of Boulder County.

FULTON and his copartners filed an adverse to Duncan's application for a patent to the Sampson lode, which is located in Boulder county. To support it they brought suit, set up their ownership of the Rainbow lode in the same mining district, and alleged an occupancy and a right of possession. We shall assume, since it is in no manner questioned, a valid discovery of mineral, a legal location and a sufficient record of the Rainbow lode. It must not be assumed on the trial that we decide any of these matters. It has not been necessary to determine the adequacy of the plaintiff's proof or the legality of his title. Both parties concede it, and the whole case turns on the direction to the jury to find a verdict for the plaintiffs. When Duncan came to his proof he offered the original location certificate of the Sampson lode, then known as the Comstock, and the additional certificate of 1891. Since the whole case turns on the rejection of these certificates and their legal sufficiency either separately or together, we quote them. The first certificate is:

"Know all men by these presents, That I, L. D. Chase of the county of Boulder in the State of Colorado, claim by right of discovery and location 1,500 feet linear and horizontal measurement on the Comstock lode along the vein thereof, with all its dips, variations and angles, together with 75 feet on each side of the middle of said vein at the surface, and all veins, lodes, ledges, deposits and surface ground within the lines of said claim 1,400 feet running West from the center of the discovery shaft, and 100 feet running East from said center of discovery shaft, said claim is situate in the Ward Mining District, County of Boulder and State of Colorado, and is bounded and described as follows:

Beginning at the North-east corner post No. 1 and running due West 750 feet to the N. Center side line post No. 2.

Thence on the same course 750 feet to the N. W. corner Post No. 3, thence due south 150 feet to S. W. cor. post No. 4. Thence due East 750 feet to S. Center side line post No. 5. Thence on the same course 750 feet to the S. E. Corner post No. 6. Thence due N. 150 feet to the place of beginning.

"Sugar Loaf Mountain at its highest point bears from the center of the discovery shaft S. 70° 30′ East and this claim is located in Section 11, T. 1 N. and Range 73 W. of the 6th principal meridian.

"L. D. CHASE." [Seal]

"Said lode was discovered on the 11th day of July, A. D. 1889. Date of location July 11, 1889. Date of this Certificate Sept. 29, 1889. Attested R. Z. Mason, Surveyor."

This certificate was recorded in the proper office on October 2, 1889, in book 117, at page 505 thereof.

Whatever title Chase acquired passed by mesne conveyances to one Sampson. While Sampson held title he filed an additional location certificate, viz.:

"Know all men by these presents, That I, Mason L. Sampson the undersigned, have relocated, and do hereby claim, by right of discovery and relocation, 1,500 feet linear and horizontal measurement, on the Comstock Lode together with all veins, lodes, ledges, and surface ground within the lines of said claim as hereinafter stated: 300 feet on said lode running N. E. from the center of the discovery shaft on said lode, and 1,200 feet running S. W. therefrom; said lode being situated in Ward Mining District, Boulder County, and State of Colorado, and more particularly described as follows:

"Beginning at the discovery shaft, an 18 foot shaft. Thence running N. E. 300 feet to N. E. end line. Thence

running N. W. 75 feet to N. E. Cor. post No. 1, set in a mound of stone. Thence running S. W. 750 feet to N. side center stake. Thence running S. W. 750 feet to N. W. Cor. Post No. 2 set in a mound of stone. Thence running S. E. 150 feet to S. W. Cor. post No. 3, set in a mound of stone. Thence running N. E. 750 feet to S. side center stake. Thence running N. E. 750 feet to S. E. Cor. post No. 4, a pine post set in a mound of stone. Thence running N. W. 75 feet to a point of intersection on the N. E. end line.

"All of said lode claim being in and forming a portion of Sec. 11, T. 1 N., Range 73 W., 6th Prin. Meridian, and locally known as lying on the top of Mountain S. of 'Dew Drop' Gulch and about 3,000 feet W. of the old California mine, a patented property.

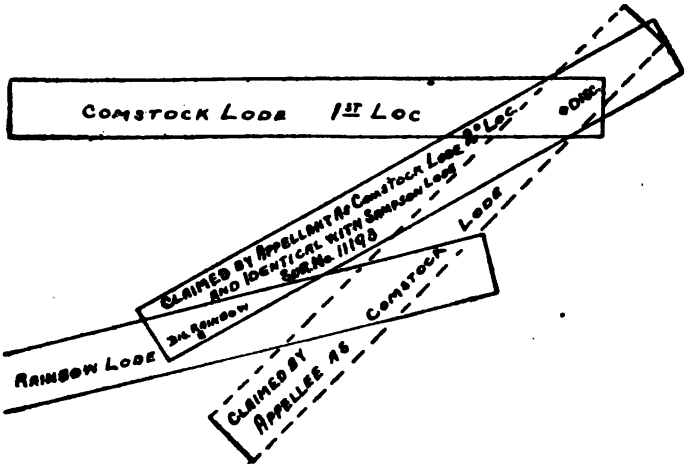
Said lode was discovered July 11th, 1889, and was located Sept. 29th, 1889. The object of this relocation and amendment being to more accurately locate the territory along the course of the Lode. The original Location Certificate is recorded in Book 117, page 505 of Boulder Co. Date of Certificate, August 29th, 1891.

"MASON L. SAMPSON." [Seal.]

This certificate was recorded in the proper office on the 28th of September, 1891.

It will be observed the description in this additional certificate starts at the discovery shaft as the locating point and runs the claim northeast of it 300 feet to the northeast end line; thence northwest to corner post No. 1 set in a mound of stone; thereafter, according to the description, the courses and distances are run southwest, northwest, southeast and northeast. It will be further noticed there is no allowance for the variation of the needle, which speaking generally is between fourteen and fifteen degrees in Boulder county. This circumstance has been made a basis of considerable argument by

counsel. To make the situation entirely plain we attach a reduced copy of a map which was received in evidence and which will more clearly exhibit the controversy.


COMSTOCK LODE 1ST LOC
CLAIMED BY APPELLANT AS COMSTOCK LODE 2D LOC AND IDENTICAL WITH SAMPSON LODE SURVEY NO. 11198
2D LOC
COMSTOCK LODE
RAINBOW LODE
CLAIMED BY APPELLEE AS

The Comstock lode originally ran due east and west. When Sampson filed his additional certificate he used the discovery shaft as a pivot on which he swung his claim, so that it ran northeasterly and southwesterly. The appellees put on the map what they designate as the second location of the Comstock; the difference betwen this and the location as stated in the certificate and the application for the patent comes from the allowance in the latter case for the variation of the needle. Allowing for that variation the claim did not run northeast and southwest, unless the true northeast and true southwest be that point of the compass with the variation allowed. The evidence tended to prove that at the time of this location in 1891, Sampson staked the claim at its four corners and the center of both side lines with posts set in mounds of stone, and that the claim as thus staked ran northeast and southwest with the due allowance for the variation of the needle. If these facts did not clearly appear there was

an offer of evidence to these points. According to the appellees' contention, the claim was never staked as platted on the map, nor was there any other location made by Sampson or his grantees and located on the ground along the lines and covering the course exhibited by the second location, as the appellant platted it.

When Duncan offered these certificates they were rejected on the theory that the description was indefinite and did not show a compliance with the statute. The objection was that the claim was not tied to any patented claim or section corner or to any other natural object or permanent monument which would make the record a statutory one. It must be remembered that in the certificate of 1891, the claim was described as in section 11, T. 1 N., range 73 W. and as lying on top of the mountain south of Dew Drop gulch and about 3,000 feet west of the California mine. The appellant then offered to prove that this mine was 3,000 feet from the claim, and that it was the oldest and only patented mining claim in the vicinity; whereupon the further objection was made that this could not be proven *aliunde*. He also offered to prove that Dew Drop gulch was a well known gulch, the center of which was about 750 feet east from the Sampson, and that the head of it was northerly therefrom about 500 feet. The defendant further offered to prove that the quarter section corner between sections eleven and twelve was not known and its location could not be ascertained. Duncan further offered to prove that the stakes set at the time of the survey in 1891, when the additional certificate was filed, were on the ground and had stood from this time to December, 1895, and that these stakes marked the lines and corresponded with the points designated at the time of the survey. All this testimony was excluded.

This statement substantially exhibits the only facts to which we need refer. As has already been suggested, no question was made respecting the abstract of title or the

regularity of the deeds, whereby the title passed to Duncan. If any title was acquired by what the locators and subsequent owners did, this title vested in Duncan and he had a right to prove it or to produce his evidence to support it and go to the jury on the proposition.

Mr. GUY D. DUNCAN, for appellant.

Messrs. GIFFIN & ROWLAND, for appellees.

BISSELL, P. J.

Mineral rights are granted to miners by federal statutes. Under the grant expressed miners may go on the public domain, discover lodes and veins and acquire title. Thereunder mining claims have been located in all the states and territories in the Rocky Mountains. The courts of these various states and territories have attempted to interpret and construe them. There is considerable diversity of judicial opinion about them. Their true meaning must ultimately be determined by the supreme court of the United States. We take it, wherever that court has expressed an opinion, it is binding on all courts and the construction which it adopts must be accepted and followed, though there may be decisions of state and territorial courts to the contrary. This is axiomatic under our judicial system. We state the proposition without qualification because we do not wholly follow the decisions of the supreme court of the state which would otherwise be binding on us. We accept and follow the decisions of that tribunal to which is committed the power and the duty to interpret federal enactments.

We bespeak a close scrutiny and a careful examination of the statement of facts preceding this opinion which has been prepared by the court.

Returning to the subject and taking up the questions in the

order in which they naturally present themselves, we will advert in the first place to the fact that there were two location certificates filed, to the descriptions found therein, and determine therefrom whether singly or together they meet the requirements of the statute. The first branch of this inquiry necessarily relates to the circumstance that two certificates were offered in evidence. The original one of 1889 and the additional one of 1891. At the outset we hold, following the supreme court of the state, that both ought to have been received. If we concede the position assumed by the appellees, that the first was insufficient, yet it should have been admitted, providing it was followed by one which either supplied what it lacked, or as a whole conformed to the statute. *Strepey* v. *Stark*, 7 Colo. 614; *Frisholm* v. *Fitzgerald*, 25 Colo. 290. Therein it was determined that when the original certificate of location may be deemed void, an additional one may be filed to correct its defects and both may be put in evidence. These authorities fairly decide this proposition. The question is not an open one, since we find no binding federal decision to the contrary. It is undoubtedly the law and what we may say about it is in no manner intended to attack the doctrine. I do not quite approve the selection of the adjective which the learned justices have used to describe the second certificate. The statute which requires the record permits a second filing (General Statutes, sec. 2400), and thereby it is provided that whenever the locator apprehends that his original certificate is defective or erroneous, or that the law has not been complied with, or he desires to change his surface boundaries, or take in a part of an abandoned claim, he may file an *additional* certificate subject to the other provisions of the act. I prefer the language of the statute to the language of the opinions. It seems to me that the subsequent certificate should be called an additional certificate, rather than an amended one, and that the use of this adjective more aptly and properly defines the privilege conferred, and

certainly suggests a better reason for the doctrine which permits the introduction than any which I have found in the opinions of that distinguished court. In the first case it is said that it tends to show good faith on the part of the locator, and again, that it offers a means of comparison in respect to descriptions and surface boundaries. Neither of these reasons are to our minds very persuasive because the question of good faith is of very little significance. If the locator wholly fails to properly describe his claim he thereby, as against subsequent and intervening claimants, acquires no rights. This would be true, whether his attempted location was made in good or in bad faith. In another sense, of course, the question of good faith is an important consideration because that is the real basis of the rule which all the courts, as we observe them, have adopted in construing these mining statutes, liberality of construction. This is the only direction in which the matter of good faith cuts any figure. Neither, on the other hand, am I much impressed with the reason suggested that it offers a means of comparison. Under the specific terms of our statute the boundaries need not be the same. The miner is given the absolute right to change his boundaries to take in overlapping and abandoned claims or other territory which has not then been located or occupied. It is to the end that the prospector may cure any defects in his location and conserve and protect the results of his industry that the authority is given. For this reason, rather than the others, it is our judgment that both certificates, the original and the additional one, ought to be admitted, and we believe if therefrom and thereby, and not necessarily from one alone, but from either one or both together, the necessary statutory steps can be shown to have been taken, the miner thereby establishes an unimpeachable title as against the subsequent claimant. In other words, we believe the law to be that though neither one as a whole may be absolutely correct and in perfect conformity to the statute, yet if in both and

from both there may be found and deduced all that the law requires, the statute being otherwise complied with, the miner's record is complete and his title is perfect.

We now recur to the inquiry whether the original or the additional certificate or both conformed to the statute. Whether the original location certificate was radically defective may be quite a debatable question. We are not so thoroughly well satisfied about it that we concede it, except for the purposes of the discussion. Following its recitals, it began at the northeast corner post No. 1, and then following specified courses and distances ran to the center and south end line to posts. It was a parallelogram running due east and west. Assuming the posts to have been put in place, the claim was located on the ground. These posts were in no way tied to any other part of the claim nor to the discovery shaft, nor to any natural object outside the claim. It will be observed however that the discovery shaft was located, and that Sugar Loaf mountain from its highest point bore from the center of it south seventy degrees, thirty minutes east, and that the claim was located in section 11, township 1 N., range 73 west of the 6th principal meridian. Had the shaft been tied to a corner it would doubtless have been good as a tie, and there would have been a sufficient reference to a natural object or permanent monument. Yet, we are not prepared to hold, nor do we say that the posts themselves as set were not permanent objects or natural monuments. Whether when a location certificate makes no other reference it would be adequate, we do not determine. It is wholly unnecessary. There is much in the *Hammer* case, hereafter referred to, which would permit an argument supporting the proposition. Conceding for the purposes of the opinion that the first certificate was insufficient, we now recur to the second.

Therein we find a description which starts at an eighteen foot shaft called the discovery shaft; thence a line is run northeasterly 300 feet to the northeast end line; thence from

the intersecting point northwest seventy-five feet to the northeast corner post No. 1 set in a mound of stone. Here we have a description started in a discovery shaft eighteen feet deep, and a line drawn to the northeast end line 300 feet long; then a line northwest seventy-five feet to a post set in a mound of stone. Now if it be true that a stake driven into the ground is one of the most certain means of identification where there is a description of the premises by metes and bounds as decided in the *Hammer* case, we have got an absolutely perfect description by a reference to a natural object. It may be said, it is quite impossible to know where the discovery shaft is, or to find the point from which the 300 foot line is to start and from which by the northwest continuation of seventy-five feet we find corner post No. 1. At this point and for the purposes of identification, we recur to the original certificate wherein the discovery shaft is absolutely located, and its position perfectly identified by the highest point of Sugar Loaf mountain, from which bears the center of that shaft seventy degrees and thirty minutes east, the claim itself being located in section 11, T. 1 N., range 73 W. of the 6th principal meridian. We certainly then have in both certificates combined, if not by the last alone, as we shall attempt hereafter to demonstrate, an absolutely perfect description which cannot be mistaken, and wherefrom any engineer could locate and bound the claim. This follows because the courses and distances from post No. 1 set in a mound of stone are all set down in the certificate.

Even though the court might be wrong on this proposition and our position might be disputed, it still remains true the claim was perfectly located by the terms of the additional certificate. At this point we revert to a decision of the supreme court of the state which we shall assume has been overruled by the supreme court of the United States. The appellees rely on it with great confidence, and practically counsel base their whole argument thereon and attempt

thereby to support the ruling of the *nisi prius* tribunal. *Gilpin County Mining Co.* v. *Drake,* 8 Colo. 386. An examination of that case will disclose that the only natural object or permanent monument to which reference was made in the rejected certificate was one which described the claim as beginning at the westerly end of the Gilpin Mining Company's property on the Williams lode. This was treated by the opinion as a description of a starting point at the westerly end of a certain mining claim. The court holds that this description is insufficient, that it is no tie and that the certificate was void because it made no reference to a natural object or to a permanent monument. The difficulty as stated by the court is that there is no point named from which the description should start. It may be that the court did not wholly base its opinion on this proposition because we find in continuance of the discussion that the discovery shaft was tied to nothing, and there was no information furnished by the certificate which would enable any one to trace the boundaries of the claim. In departing from the apparent conclusions of the supreme court, we go no farther than to hold that in so far as that court decided that a tie to a patented claim was not a good tie, it is not in accord with the supreme court of the United States. We do not discuss nor consider whether in other respects the description was so far invalid that it could not be upheld. We only intend to dissent from the opinion with respect to its determination that a tie to a patented claim is insufficient. In this we are completely supported by the following cases: *Hammer* v. *Garfield M. & M. Co.,* 130 U. S. 291; *Bennett* v. *Harkrader,* 158 U. S. 441; *Vide Jackson* v. *Dines,* 13 Colo. 90. According to the *Hammer* case which was rendered by a unanimous court, the opinion having been written by that eminent mining lawyer, Mr. Justice Field, the only tie mentioned in the recorded certificate was in these terms: "This lode is located about 1,500 feet south of Vaughan's Little Jennie Mine." There

was no other tie; there was no other reference to a permanent object or to a natural monument; no courses or distances given except courses and distances stated as north, east, west and south; and four named stakes A, B, C and D. How these stakes were set, how the claim was to be found otherwise than by this reference, it is impossible to discover. Notwithstanding this, and with this general description and this general tie, the court holds that the statute which requires that the records of mining claims shall contain a description by reference to some natural object or permanent monument, was fully complied with by such a description and by such a reference. It holds that stakes driven in the ground are the most certain means of identification. It states that in this case the stakes were placed and that the location of the lode was identified by its distance south of Vaughan's Little Jennie Mine. That distinguished court says: "We agree with the court below that the Little Jennie Mine will be presumed to be a well known natural object or permanent monument until the contrary appears." If this doctrine be true, and we are compelled to accept it and we fully concur in it, how it can be held in this case that there is no reference to a natural object or permanent monument when the claim is described as 3,000 feet west of the old California mine, a patented property, and the defendant offered to prove that this was the exact distance of the Sampson mine from it. This same doctrine was followed six years later and the case approved by the same court. *Bennett* v. *Harkrader, supra.* We find, however, in the additional certificate a still further reference which adds force and strength to the tie on which the defendant had a right to rely. The lode is described as on top of the mountain south of Dew Drop gulch. It is located as in section 11, township 1 N., range 73 west of the 6th principal meridian. It had an adequate description by the combination of the original and the additional certificate in the tie of the discovery shaft. That shaft is tied to the

highest point of Sugar Loaf mountain by a surveyor's line described as seventy degrees and thirty minutes east therefrom, and the defendant offered to show that such was the bearing of that discovery shaft and such the proper line and the proper point. In addition to this, it may be well argued and contended, and we think properly so, that when once the discovery shaft is located by reference to a mountain peak and therefrom a line is run to one of the end lines and to the middle of it, and thence to a corner post set in stones, that thus and thereby, by reference to a natural object and permanent monument, the miner has located his claim in exact conformity to this statute. We further hold that these two certificates, the original and the additional certificate, may be taken together, and if from the description contained in both, each referring to the other, the claim is properly described and adequately located by reference to a natural object and to a permanent monument, the locator has fully complied with the law. Permanent monuments have been defined in many cases. *Creede M. & S. Co.* v. *Highland H. & M. Co.,* 95 Fed. Rep. 911; *Meydenhauer* v. *Stevens,* 78 Fed. Rep. 787; *Southern Cross Co.* v. *Europa Co.,* 15 Nev. 383. In these various decisions and many others which need not be cited, it has been time and again held that mountains, hills, canons, gulches, ravines and like natural elements in the landscape are natural objects and permanent monuments to which reference may be made. We here have not only a reference to the California mine but the claim is described as in section 11 and on the top of the mountain south of Dew Drop gulch, which when the claim is properly staked on the ground, is probably an adequate description. The whole object of the statute which requires a reference to a natural object or permanent monument is to direct the attention of the aftercomer to the locality of the claim, and if he goes on the ground and finds the claim properly staked, he may then go to the record and find out whether the statute has other-

wise been complied with, and if therein there is a statutory description, the record is adequate and sufficient. *Flavin* v. *Mattingly,* 8 Mont. 242; *Brady* v. *Husby,* 21 Nev. 453.

We therefore conclude from an inspection of these two location certificates that the court erred in refusing to admit them.

We do not regard the decision in *Drummond* v. *Long,* 9 Colo. 336, as necessarily in opposition to this position. It is quite true a reference was made to the Hawkeye lode from which the Portland is said to lie about 1,500 feet north. Nothing further is stated about the Hawkeye. We are not advised whether it was a patented or a well known claim. The discovery shaft of the Portland was not tied to any corner or monument of either the location or the lode, nor was it possible to determine from what point on the Hawkeye location one should start to find and identify the shaft. It is quite true there is an apparent discrepancy between that opinion and the *Hammer* case. It is quite possible to construct an argument on the latter which would tend to overthrow, or at least to weaken, the force of the decision. We are not compelled, however, to resort to a criticism of that case in order to support the present decision. In the location certificate under examination we have a discovery shaft perfectly located by reference to a natural object. The northeast end line and the center of it is determined by a line run 300 feet from the discovery shaft. Thus drawn it will strike the end of the lode; thence northwest a line is run seventy-five feet to corner No. 1 which is a post set in a mound of stones. The discovery shaft is perfectly located by reference to a natural object, and taking that as a starting point, we come to a post in a mound of stones which is a natural object in the ground, and one of the best of all monuments for the description of a mining claim. We likewise have a description of a claim lying on the top of a mountain south of Dew Drop gulch and 3,000 feet from the California mine to the east. There can be found

within the lines of the Drummond decision an argument and some positions which are seemingly in conflict with our decision. It may be difficult and require much ratiocination of a keen and subtle variety to reconcile this decision with those two cases in the 8th and 9th Colorado, and it may appear as though we were straining a point in attempting to distinguish this case from them. Whether distinguishable or not, we are bound by the decision of the supreme court of the United States. These references and these descriptions are entirely adequate and support the appellant's title, his claim being otherwise validly located.

We deem it best now to refer to one other proposition which may become of some consequence on the subsequent hearing. It will be remembered that the Sampson lode, as it was called after it was swung on the discovery shaft as an axis, was transmuted from a claim running due east and west to one running northeast and southwest. At the time of the swing, the Sampson lode was staked on the ground by stakes at the four corners set in mounds of stone and with another in the center of each side line. If the location was made on a valid discovery and the statute was otherwise complied with, and the jury shall so determine, then we must hold the Sampson lode as located in 1891 was a valid location as against the Rainbow at that date. This is self-evident because at the date of that location the Rainbow lode had not been discovered or located, nor had any shaft been sunk on it, nor any claim made about it. Nothing was done on this claim until August 30, 1895. It consequently follows, if the Sampson lode was properly located on the ground and properly staked, the notices properly posted, the annual labor performed and all things done in conformity to the statute, the Sampson lode had a good title when the Rainbow lode was located. On the argument and in the briefs of counsel we have been referred to the case of *Frisholm* v. *Fitzgerald*, 25 Colo. 290. We cite the case to support our position that the original and addition-

al certificates were admissible. It states a further proposition which is used as an argument here, about which we are not at liberty to express our views. The principal opinion was prepared by Mr. Justice Goddard in whose judgment I have great confidence. This proposition respects the extent to which a locator may go when he files an additional certificate and the rights which he may thereby acquire. Observing the special concurrence of the chief justice and of Mr. Justice Gabbert, I notice that they express no opinion concerning his construction of section 2400 of our General Statutes. Mr. Justice Goddard very broadly holds that the locator of a mining claim may file this additional certificate for the purpose of correcting errors in his original location, or errors in the description of his claim, and that this additional certificate will confirm and secure his title as against any intervening claimants, his rights having been otherwise properly initiated and secured, providing he does not change the boundaries of his location. We are not required to consider this question. We neither decide it nor express an opinion about it because the subsequent location certificate of the Sampson lode, which describes the lode as swung upon the discovery shaft to a northeasterly and southwesterly direction was *fait accompli* before the Rainbow lode was located. The owner of the Comstock, which he ultimately called the Sampson, swung the claim, staked the ground and did the annual work, and we assume, although all these questions are open to evidence on the subsequent trial, did everything necessary to perfect the claim prior to the time Fulton and his copartners located the Rainbow. There was a change of boundaries and a taking in of other land, but there was no intervening claimant. We therefore hold that the owner of the Sampson lode had a perfect right to swing the claim and change the location and take in other ground. Since this is true, it necessarily follows, all other facts being found by the jury in his favor, he acquired a good title.

In all this discussion and in whatever may be found in this opinion bearing on the questions of fact, it must not be assumed that we have attempted to conclude the parties on any matters of proof respecting the discovery of mineral, the staking, or the posting of notices, or the completion of the record and the transfer of title. It has necessarily been indulged in to elucidate and settle the questions of law. What we intend to hold is, that the court erred in refusing to admit the original and the additional certificate of location of the Comstock or Sampson lode. We hold that there is on the face of the second certificate a sufficient and adequate description by references to a natural object and a permanent monument. We further hold that the original location certificate is admissible and that it, with the additional certificate, may be used to determine any point in the claim or in the description of it by the required reference to a natural object and a permanent monument.

Since we conclude the court erred in rejecting these certificates its judgment entered on a directed verdict must be set aside and the cause remanded for a new trial in conformity to this opinion.

Reversed.

MADISON BROOKS v. WILLIAM A. KUNKLE ET AL.

(24 Indiana App. 624; 57 N. E. 260. Appellate Court. May 15, 1900.)

[1]**Self-ending lease without rental.** Where an oil lease provided that if no well was completed within 90 days the same should become void unless the tenant should pay a certain rental, with no covenant either to sink or to pay the rent, no cause of action exists against the tenant for his failure to pay rent.

Appeal from Circuit Court, Wells County; E. C. Vaughn, Judge.

Action by Madison Brooks against William A. Kunkle and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

I. W. CHRISTIAN, W. S. CHRISTIAN, F. E. GAVIN, T. P. DAVIS, J. L. GAVIN, and MOCK & SONS, for appellant.

J. S. DAILEY, A. SIMMONS and F. C. DAILEY, for appellees.

BLACK, J. A demurrer for want of sufficient facts to the complaint of the appellant against the appellees was sustained. The complaint was based upon a written instrument

[1]*Glasgow* v. *Chartiers Oil Co.*, 17 M. R. 523.

Coal lease construed holding no rent due till mine opened, without construction as to whether lessee was bound to open a mine. *Reed* v. *Beck*, 66 Ia. 21; 23 N. W. 159.

Parol evidence allowed to explain ambiguous language of lease, as to whether reduction of rent applied to one well or to all wells. *Hunter* v. *Appollo Co.* 204 Pa. 385; 54 Atl. 274.

An oil lease called for $25 per annum and use of gas by the lessor: *Held*, that non-payment of the rent did not forfeit lease where the lessor continued to use the gas. *King* v. *Morristown Co.*, 31 Ind. App. 476; 68 N. E. 310.

alleged to have been executed by the appellant on the 13th day of May, 1897, to the appellee Kunkle, and by him assigned in writing on the 3d of July, 1897, to the other defendant, the Ohio & Indiana Oil Company, which caused it to be recorded in the office of the recorder of Hancock county on the 19th of March, 1898; the instrument and assignment being set out in the complaint. The written instrument was as follows: "In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, Madison Brooks of Hamilton county, in the state of Indiana, first party, hereby grant unto W. A. Kunkle, of second part, his heirs and assigns, all the oil and gas and other minerals and mineral water in and under the following described real estate, together with the right to enter thereon at all times for the purpose of drilling for oil and gas and all other minerals and mineral water, and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil, gas, minerals and mineral water taken from said premises, excepting and reserving, however, to first party, the one-sixth part of all oil or other minerals produced and saved from said premises, to be delivered in tanks at wells or in pipe lines with which said second party may connect his well or wells; said real estate being described as follows [describing a tract of one hundred and sixty acres in Hancock county]; to have and to hold the said interest in and to the above premises on the following conditions: If gas only is found, second party agrees to pay $100.00 per year for the product of each well while the same is being marketed off the premises, and first party may use gas free of cost to heat and light dwelling house during said time, whenever said first party shall request it. Said second party shall bury all oil and gas lines being laid through tillable land below plow depth, and pay all damages to growing crops by reason of the burying and removing said lines. No well shall be drilled nearer than three hundred feet of the house or barn

on said premises, and no well shall occupy more than one acre. In case no well is completed within ninety days from this date, then this grant shall become null and void between the parties hereto, unless the second party shall pay to said first party one dollar per acre for each year thereafter the completion of such well is delayed, said rental to begin at date of lease. The second party shall have the right to use gas, oil, or water to run all necessary machinery for operating for any purpose on said real estate, and shall also have the right to remove all its property from said premises at any time. It is understood that second party shall have the privilege to surrender this lease at any time by first paying the rental on said land to date of such surrender. It is understood between the parties to this grant that all conditions between the parties hereto shall extend to their heirs, executors and assigns. In witness whereof the parties of this grant have hereunto set their hands and seals," etc. The instrument was signed and sealed and acknowledged before a notary public by said Madison Brooks only.

It was further alleged "that ever since the execution of said lease said defendants have had possession of said real estate for all the purposes therein stipulated, and have failed and refused to drill for oil, gas, minerals, and mineral water, as stipulated in said lease, and have failed and refused to pay the rental therefor, and have failed and refused to perform their part of said agreement; and plaintiff says that there is due and owing him for rental on said lease the sum of," etc., "wherefore," etc.

Where a person against whose capacity to make a contract nothing appears has thus executed and acknowledged such a formal instrument to one who has assigned it to another, who has caused it to be recorded in the office of the county recorder, and it is brought into litigation by the party who executed it, asserting rights and obligations thereunder, it will not be presumed that it was therein intended by the parties,

or either of them, to do a useless or absurd thing; yet where there is no averment of fraud or mistake the intention of the parties must be sought in the terms of the instrument. A capable party might execute such a contract lawfully, and with reasonable expectation of deriving benefit upon the occurrence of events contemplated by its provisions, but not from mere lapse of time. No absolute obligation to drill a well or do any act whatever was cast upon the party of the second part by the terms of the instrument, which, by its language, is characterized both as a grant and as a lease, and which is referred to in the complaint as a lease. It was, by its terms, to be entirely optional with the party of the second part whether or not anything should ever be done by him by way of use of the land; and, as no well was made, there arose no obligation to pay for oil or gas. It was provided that, in case no well should be completed within 90 days from the date of the instrument, the grant should become null and void, unless the party of the second part should pay the party of the first part one dollar per acre for each year the completion of a well should be delayed thereafter, said rental to begin at date of lease; and the party of the second part was to have the unconditional right to remove all "its" property from the premises at any time, and to have the privilege of surrendering the lease at any time by first paying the rental on the land to the date of surrender. It does not appear that any of the property of the second party was ever placed on the land or removed therefrom, or whether or not there was any affirmative surrender or proposal therefor; but more than a year had elapsed and the party of the second part had failed to avail himself of the right to drill a well, and no rent had been paid. There was no absolute requirement that the party of the second part should pay any rent, but the grant was to be void unless rent were paid. The instrument is susceptible of being construed as an expression of a rational and lawful agreement. We

must construe it as expressed, attributing to the language its ordinary meaning; and we cannot construct a different contract by injecting additional words not implied in the terms employed by the parties, or by substituting meanings merely conjectured by us to be more reasonable than those expressed.

Judgment affirmed.

ERNEST LAGARDE ET AL. V. THE ANNISTON LIME & STONE CO.

(126 Alabama 496; 28 So. 199. Supreme Court. May 17, 1900.)

[1]**Fiduciary relation between officers and company.** The directors or other governing members of a corporation, in their dealings respecting corporate interests, are subject to the rules which govern the acts of persons occupying fiduciary relations; and, therefore, it is a breach of their fiduciary obligations for such officers, by acquiring property for themselves, to interfere with the enjoyment by a corporation of beneficial property rights or to prevent the corporation from acquiring property, or in any way impairing the value of the corporation's property rendering it less effectual for the purposes of its corporate creation; and such derelictions will, in equity, be construed as a fraud on the corporation, establishing a constructive trust in its favor.

Officers purchasing land optioned to their company. Where defendants, who were president and secretary of plaintiff corporation, knew that the latter had a lease on certain land, and a contract for its purchase, it was a breach of the trust arising out of their fiduciary relation for them to purchase such land for their own use, and equity will hold them trustees thereof for the benefit of plaintiff.

The mere fact that the plaintiff corporation was negotiating for the purchase of certain property did not give it such an interest or expectancy therein as would render a purchase thereof by its president and secretary a breach of their fiduciary obligation amounting to a fraud.

Appeal from City Court of Gadsden; John H. Disque, Judge.

[1]**Directors bought in conflicting claims to protect the company property and sold the title so acquired to their company, for stock. The other stockholders were allowed a part of the benefit resulting from the purchase and accepted such benefit. *Held*, that it was not a case where the directors could be treated as trustees acting for the sole interest of the company. *Mackey* v. *Burns*, 16 Colo. App. 6; 64 Pac. 485.**

Suit based on a contract between president of a mining company and a milling company, to ship ore to the mill, for a percentage. *Fox* v. *Hale & N. Co.*, 108 Cal. 369; 41 Pac. 308.

Bill by the Anniston Lime & Stone Company against Ernest Lagarde, John B. Lagarde, Louis D. Lagarde, J. A. Blount and Obal Christopher to declare John B. Lagarde and Louis D. Lagarde trustees of certain land for the benefit of plaintiff. From a decree overruling demurrers to the bill, defendants appeal. Affirmed.

The bill in this case was filed by the Anniston Lime & Stone Company against the appellants. The case made by the averments of the bill is substantially as follows: The complainant is a corporation organized under the laws of Alabama for the purpose of quarrying limestone and the manufacture of lime. It has been engaged in this business for a number of years prior to 1896. The complainant had been for some time prior to January, 1896, negotiating for and endeavoring to purchase certain lands and easements upon said lands on which is located a very valuable quarry of limestone. This land is specifically described in the complaint. In 1896 the complainant succeeded in purchasing an undivided one-third interest in said lands and easements. The remaining two-thirds interest was owned by Obal Christopher and W. L. Martin, each owning an undivided interest in said

The fact that a corporation was formed and took title to the mine, that being a part of the original plan of sale, will not prevent the impeachment of the contract for fraud. *Cornell* v. *Corbin* (Cal.) 30 Pac. 629.

A stockholder, acting also as attorney, cannot buy in and hold a hostile title against his company. *Owers* v. *Olathe Co.*, 6 Colo. App. 1; 39 Pac. 980.

By advice of a director, royalty was reduced by the company, he concealing the fact that he was in receipt of a private royalty for his original consent to the lease: *Held* to account. *Bird Coal Co.* v. *Humes*, 157 Pa. 278; 27 Atl. 750.

Preventing stockholders from seeing the mine and concealing fact of ore disclosed is ground to rescind sale of stock purchased by the parties in charge of the mine. *Hanley* v. *Sweeny*, 109 Fed. 712; 21 M. R. —.

lands. The complainant entered into a negotiation with said Christopher to purchase his said lands and easements, and at that time there was a mortgage or other lien held by the Queen City Bank on said Christopher's interest, on account of which he could not convey to the complainant a good title to his undivided interest in said lands; but in January, 1896, entered into a contract with the complainant to convey his interest to it as soon as he was able to make good title thereto. The said Christopher also, by a contract, leased his undivided one-third interest in the lands to the complainant. W. L. Martin owned the remaining one-third interest in said lands and easements, which interest the complainant has negotiated for and endeavored to purchase at various times. The lands lay very near to other lands owned by the complainant, the chief value of said lands and easements consisting in a limestone quarry situated on the lands, and it was greatly to the complainant's interest to acquire the other two-thirds interest in said lands and easements. In the year 1897, Ernest Lagarde & Sons, composed of Ernest Lagarde, John B. Lagarde, and Louis D. Lagarde, became stockholders

Suit by stockholder charging director with conspiracy to wreck the company by litigation and otherwise. *Birmingham Co.* v. *Mutual Co.*, 96 Ala. 364; 11 So. 368.

An executor sold stock of the estate considered worthless for a nominal sum. Afterwards learning that it had value he bought it back, representing that it was worthless and he only wanted it back for old associations. *Held*, that the party who bought for a nominal sum had a case against the executor. *Edelman* v. *Latshaw*, 18 M. R. 608.

Where stock almost worthless was sold on false statement that it was worth 80 cents on the dollar, aided by false prospectus issued by the company, such representations may amount to a warranty and justify reconveyance of the property conveyed for the stock. *Ormsby* v. *Budd*, 72 Ia. 80; 33 N. W. 457.

Relation of the value of the stock to the value of the mine considered. *Keener* v. *Baker*, 93 Fed. 377.

Right of action to set aside mining sale for fraud does not survive against executors. *Strattons Ind.* v. *Dines*, 126 Fed. 968.

in the complainant corporation, and John B. Lagarde and L. D. Lagarde were elected and became directors of the complainant. That same year John B. Lagarde was elected president and Louis D. Lagarde was elected secretary and treasurer of the complainant, and continued to hold such position until April 19, 1899. That by reason of their official connection with the complainant they exercised large control and supervision over the complainant's entire business, and in that way became acquainted with all the properties owned by the complainant, together with the lease and contract to purchase as before mentioned, and also ascertained the value of the land in question to any one engaged in the same business as was the complainant. It was then averred in the bill that John B. Lagarde and Louis D. Lagarde, while holding the office of director and while president and secretary and treasurer of the complainant, and without the complainant's knowledge and consent, some time in the month of March or April procured J. A. Blount to purchase for them from Obal Christopher and the Queen City Bank the interest in the lands and easements owned by said Christopher, taking a deed thereto from said bank and said Christopher to J. A. Blount, for which interest they paid the sum of $1,000. Some time in the same month said John B. and Louis D. Lagarde, without the complainant's knowledge and consent, procured the said Blount to purchase from W. L. Martin the other one-third interest in the lands and easements owned by him, taking a deed thereto in the name of John B. Lagarde, for which said interest they paid $800. It was then averred on information and belief that the said John B. Lagarde and Louis D. Lagarde purchased said lands and easements for the purpose of quarrying the limestone from the quarries located thereon, and manufacture the lime therefrom, which lime they proposed to sell in competition with the complainant. Continuing, the bill averred as follows: "That it was by and through said connections the said

John B. Lagarde and Louis D. Lagarde had with orator that they learned of the existence of the limestone quarry located on said lands; that during their said connections with orator, and before said purchases from Christopher and Martin were made, and by and through said connections, said John B. Lagarde and Louis D. Lagarde became fully aware of the facts that orator had prior thereto become the owner of an undivided one-third interest in said lands and easements; that it had a contract with said Christopher, for him to convey his undivided one-third interest to orator, also a lease on his interest in the same, and that it had endeavored to obtain and was still desirous of obtaining the remaining one-third interest from said W. L. Martin; that at the instance of said John B. Lagarde, while acting in said official capacities, the attorney of orator, just prior to the time when said Lagarde procured these purchases, furnished them an abstract of title to said lands, the expense of which the Lagardes charged up to orator, which abstract they pretended to desire as officers of the company." Ernest Lagarde, John B. Lagarde, Louis D. Lagarde, J. A. Blount, and Obal Christopher were made parties respondent to the bill.

The prayer was that on final hearing it be decreed that John B. Lagarde and J. A. Blount held the title to the two-thirds undivided interest in the lands and easements described in the bill in trust for complainants, and that upon the payment into court of $1,800, or such an amount as might be determined or ascertained it had been paid for said two-thirds interest in said lands, that the said John B. Lagarde and the said J. A. Blount be decreed to convey to the complainant all paper conveyances of said two-thirds interest held by them, and that each of said parties be decreed to convey the one-third interest held by each of them.

There was also a prayer for general relief. To the bill as amended the defendants demurred upon the following

grounds: "(1) The bill shows no purchase of the lands and easements described in it in trust for complainant. (2) It shows no duty on part of respondents, or either of them, to purchase said lands and easements for complainant. (3) Respondents breached no duty or trust to complainant in buying the lands for themselves, or in failing to buy them for complainant. (4) The bill as amended shows no trust relation to complainant in respect of the purchase of said lands and easements. (5) It shows no breach of any trust relation to complainant in respect of the purchase of said lands and easements."

On the submission of the cause upon the demurrers the judge of the city court, sitting as chancellor, rendered a decree overruling them. From this decree the defendants appeal, and assign the rendition thereof as error.

DORTCH & MARTIN, for appellants.

HOOD & MURPHREE, for appellee.

SHARPE, J. It is well settled that directors and other governing members of a corporation are so far agents of the corporation that in their dealing respecting corporate interests they are subject to the rules which apply generally to persons standing in fiduciary relations, and which forbid such persons to secure an advantage for themselves which fidelity to the trust reposed in them would carry to others whose interests they ought to represent. It is a breach of their fiduciary obligations which equity will not tolerate for such officers, in antagonism to the corporate interest, to oust the corporation from beneficial property rights which ought to be preserved to it by acquiring the property for themselves. Derelictions of this kind are treated as a fraud on the corporation out of which equity will raise a constructive trust in its favor. 3 Thomp. Corp. § 4073; 3 Pom. Eq. Jur. § 959; *Blake* v.

Railroad Co., 56 N. Y. 489; *Averill* v. *Barber*, 6 N. Y. Supp. 255; *Covington R. Co.* v. *Bowler's Heirs*, 9 Bush. 468.

There is a reasonable expectancy attending a lease of land that the tenant holding possession under it will be able to renew the lease at its expiration, which expectancy is, under some circumstances, recognized as a valuable property right, though the tenant may have no way of enforcing renewal. Equity will so regard and treat it as against those occupying fiduciary relations to the tenant in respect to the leased property where they seek to supplant the tenant in the renewal of the lease, and the doctrine applies where a corporation's managing officers so offend against it. *Robinson* v. *Jewett*, 116 N. Y. 40, 22 N. E. 224; 3 Thomp. Corp., supra.

These principles condemn the purchase by the Lagardes of Christopher's interest in the property here involved. Both by the lease and the contract to sell which Christopher had executed to the complainant it had rights in that interest which the Lagardes, as officers of the corporation, were bound to recognize and respect, but of which they will completely devest it if the transaction is allowed to stand. That purchase by them under the circumstances alleged in the bill was a palpable breach of duty to the corporation, and to prevent the consummation of a wrong the purchase may be held to inure to the complainant's benefit upon its equitably reimbursing the Lagardes on account of what they have expended in the purchase.

A different case is presented in the alleged purchase of Martin's one-third interest. When bought by the Lagardes, that property was held by a title distinct from the other tertiary interests held by complainant and Christopher, respectively, and in it the complainant had no property or right. No expectancy of value springs from the alleged fact that complainant "has been negotiating for and endeavoring to purchase" that interest at divers undesignated times. It

does not appear that the Lagardes had been authorized to conduct such negotiations, and whether they would ever have been resumed is merely conjectural.

Proprietorship of the Martin property may have been important to the corporation, but it is not shown to be necessary to the continuance of its business, or that the Lagardes' purchase in any way impaired the value of the corporation's property. In such case it is immaterial that knowledge of the situation was gained by the Lagardes through their connection with the corporation, since no breach of duty is traceable to such knowledge. The duty is only co-extensive with the trust, so that in general the legal restrictions which rest upon such officers in their acquisitions are generally limited to property wherein the corporation has an interest already existing, or in which it has an expectancy growing out of an existing right, or to cases where the officers' interference will in some degree balk the corporation in effecting the purposes of its creation. An example of the latter class of cases is found in *Blake* v. *Railroad Co., supra,* where persons who were directors in the railroad company bought rights of way along its projected route; also in *Averill* v. *Barber,* 6 N. Y. Supp. 255, where persons occupying a like position obtained certain patent rights, to work under which was the purpose for which the corporation was formed.

Good faith to the corporation does not require of its officers that they steer from their own to the corporation's benefit, enterprises, or investments, which, though capable of profit to the corporation, have in no way become subjects of their trust or duty.

The bill lacks equity so far as it seeks relief concerning the last-named property, but is good as to the Christopher property; and the demurrer, having been interposed to it as a whole, was properly overruled.

Let the decree appealed from be affirmed.

JACOB N. RICE ET AL. v. B. R. RIGLEY ET AL.
(Moore et al., Interveners.)

(7 Idaho 115; 61 Pac. 290. Supreme Court. May 18, 1900.)

[1]**Facts of the case. Theory of trust.** Where the evidence showed that plaintiffs contributed part of the provisions for a prospecting trip, but left it doubtful whether they were to be interested in new discoveries or only in the location work on some undisputed claims: Held, that a prospecting contract must be as strictly proved as any other resulting trust and that their case was not made good.

[2]**Degree of proof.** To establish a resulting trust in land, the evidence must be so clear and certain as to leave no well-founded doubt upon the subject.

Preponderance not enough. In an ordinary equity suit, the allegations of the complaint may be established by a preponderance of the evidence, but to establish a trust in land, and to obtain a decree for specific performance, the contract sought to be enforced must be fully and clearly proved. A mere preponderance of evdence is not sufficient.

Plaintiff testifying after decease of defendant. Under the provisions of subdivision 3, § 5957, Rev. St., in an action against an administrator to establish a resulting trust in land, the plaintiff in such action is disqualified from being a witness as to matters of fact occurring before the death of such deceased person. *Nasholds* v. *McDonell* (Idaho), 55 Pac. 984, overruled on that point.

The term "claim or demand," as used in said section 5957, embraces all rights of action for the establishment of a trust in land, as well as claims or demands for debts or damages against the estate of a deceased person.

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[1]*Craw* v. *Wilson*, 18 M. R. 244.

[2]*Cisna* v. *Mallory*, 19 M. R. 227.

If one of the associates quits before mineral is struck he cannot claim an interest in the perfected location made by the party continuing to work. *McLaughlin* v. *Thompson*, 2 Colo. App. 135; 29 Pac. 816.

The consideration of the contract is made good by prospectors discovering gold on the land and he can force the owner to convey the promised half interest and has right of action against the owner if he has sold to an innocent party. *Brown* v. *Bowman*, 119 Ga. 153; 46 S. E. 410.

Appeal from District Court, Idaho County; Edgar C. Steele, Judge.

Action by Jacob N. Rice and Perry Mallory against B. R. Rigley and others. John C. Moore and others intervene. Judgment for plaintiffs and defendants appeal. Reversed.

JAMES E. BABB and W. N. SCALES, for appellants.

V. BIERBOWER and ALBERT ALLEN, for respondents.

STOLL & MACDONALD, for interveners Gliddens.

REID & WORTH, for intervener John C. Moore.

SULLIVAN, J. This action was brought by the respondents Jacob N. Rice and Perry Mallory to enforce the specific performance of an alleged oral prospecting or grub-stake contract, and to compel a conveyance to them of an undivided one-half interest in and to the Big Buffalo, Merrimac, and Oro Fino mining claims, situated in Buffalo Hump or Robbins mining district, in Idaho county, which mining claims, it is alleged, were located by appellants and defendants B. R. Rigley and C. F. Robbins in pursuance of said alleged oral grub-stake contract. After the commencement of the action, and before the trial, the defendant Robbins died, and one Dell Butterworth was appointed administrator of the estate of said deceased, and was substituted as a party defendant, and is an appellant here. The deceased, Robbins, during his lifetime, conveyed an interest in said mining claims to the defendant and appellant A. F. McKenna, and thereafter the defendants Dell Butterworth and Michael Green acquired an interest in said mining claims through said McKenna, and said defendants Butterworth and Mrs. Florence Young acquired interests in said mining claims through the defend-

ant Rigley; and it is alleged that said interests so acquired by defendants Butterworth, McKenna, Green, and Young were acquired with full knowledge of the rights and claims of plaintiffs. The interveners (respondents) John C. Moore, Harry M. Glidden, and Margaret P. Glidden claim an interest in said mining claims, the former through the plaintiff Mallory, and the Gliddens through the plaintiff Rice. The interveners are respondents on this appeal.

The allegations of the complaint, so far as material on this appeal, are: That the respondent Mallory had, before the location of said mining claims, acquired knowledge of the whereabouts of the ledges of quartz on which said claims were located, and that such knowledge was of great value to one seeking to locate mining claims. That on or about the 30th day of July, 1898, the respondent Mallory informed his co-respondent Rice and appellant Rigley and said Robbins, now deceased, of said quartz ledges, and advised them that it would be (liable to be) a good enterprise to go and locate the same. That thereupon, on said 30th day of July, the respondents Mallory and Rice and defendants Rigley and Robbins entered into an agreement of co-partnership for the purpose of locating said ledges or veins. That by the terms of said agreement it was mutually agreed that said Mallory was to furnish a description of the locality of said veins or lodes so as to enable Rigley and Robbins to find and locate them, and the respondent Rice was to furnish the supplies or grub necessary to sustain Rigley and Robbins while going to and locating said veins and returning therefrom, and tools with which to do the necessary work; and that said Rigley and Robbins, in consideration of said information furnished by Mallory, and of the supplies, tools, and materials furnished by said Rice, agreed to proceed at once to the locality of said veins, and, if possible, to locate the same in the names of Mallory, Rice, Rigley, and Robbins for their joint benefit, share and share alike. That in pursuance of said agreement

of co-partnership information and supplies were furnished, and said Rigley and Robbins located said mining claims, but located them in the names of said Rigley and Robbins only, and denied any right, title, or interest of said Mallory and Rice therein. That thereafter Rigley and Robbins conveyed an undivided interest in said mining claims to McKenna, Butterworth, and Young, as above stated. Said McKenna conveyed an interest therein to Butterworth and Green, and it is alleged that said conveyances were given and received with full knowledge of the alleged rights of Rice and Mallory in and to said mining claims, and that said grantees are made parties for that reason. The material allegations of the complaint were put in issue by the answer. The Gliddens filed a complaint in intervention, alleging that said Rice had entered into a contract with them for a transfer of a share of his alleged interest in and to said mining claims, and prayed for an enforcement thereof. Rice and Mallory defaulted to said complaint in intervention. The appellants Rigley, Butterworth, McKenna, Green, and Young answered, and put in issue the allegations of the complaint in intervention. J. C. Moore also filed a complaint in intervention setting up an alleged agreement with said Rice whereby said Rice agreed to transfer to the intervener Moore a certain share of the alleged interest of said Rice in and to said mining claims. Said Rice, Gliddens, and the defendants (appellants) answered Moore's complaint in intervention, and put the material allegations thereof in issue. The action was tried by the court without a jury upon the issues made, and judgment and decree were entered in favor of the plaintiffs; also in favor of the interveners Mr. and Mrs. Glidden and against the intervener Moore. The defendants moved for a new trial, which motion was denied by the court. This appeal is from the judgment and order overruling the motion for a new trial.

This is an action for the specific enforcement of an alleged

oral prospector's grub-stake contract, and the following facts appear from the record: One J. E. Berryman had, about the year 1861, discovered a placer mine within 12 or 15 miles, as he believed, of the mountain known and designated as "Buffalo Hump," in what is now Idaho county. That since his discovery of said placer mine he had made six or seven trips into the Buffalo Hump region for the purpose of again finding said placer mine. In the latter part of June, 1898, while on another trip to the Buffalo Hump region to find said lost placer mine, he met the respondent Mallory and three others, to wit, Percival, Strong, and Cotter, at Craig's Mountain; and from near Denver, on Camas Prairie, they traveled together to Florence, and on to Meadow creek. Berryman stopped there in a cabin that he had erected in 1870 or 1871. Mallory and his party went on a few miles further, and camped, but returned to Berryman's camp in four or five days. Berryman was waiting for two men by the names of Montgomery and Fuller, who had promised to meet him there. While waiting for Montgomery and Fuller, Berryman and the others prospected there a little. Finally, on the 3d day of July, 1898, Montgomery and Fuller arrived at Berryman's cabin, but were not ready to proceed on the intended trip in search of said lost placer mine. Berryman had told Mallory of the object of his trip in search of the lost placer mine, and Mallory expressed a desire to accompany him on said trip. Berryman informed him that he would be very glad to have him go, as in that region there was plenty of country and plenty of room. So, on the morning of July 5th, Berryman, Mallory, and said Percival, Strong, and Cotter started on the intended trip. Montgomery and Fuller, not then being ready to proceed, followed the Berryman party, and overtook them on that day. The party arrived at Wind river, which is about 15 miles from the town of Florence, on the way to the Buffalo Hump country, and did some prospecting there. Some, if not all, of the parties,

—Mallory among them,—made partial locations of quartz claims there. Those partial locations were made on July 8th. The party broke camp at Wind river on the 9th of July, and on the 10th or 11th of July arrived at Buffalo Hump, and camped in the saddle of the Hump until the 13th day of July. In the meantime prospecting was done, and search for the lost placer mine was made. While camped at Buffalo Hump, they camped in the immediate vicinity of, if not on, the Big Buffalo ledge. That ledge was a very prominent one, and there were large quartz boulders all around their camp. No locations, however, were made on said ledge. On July 13th the party broke camp, and returned to Florence, and arrived there on the evening of the 14th of July, and camped near there, at Meadow creek. Berryman camped in the cabin above referred to, and Mallory and others near by. Berryman testified that while he was standing in the door of the old cabin the appellant Rigley drove up, and commenced to talk to him about the location of the country, and inquired if witness "knew of any place where there was likelihood of gold quartz mines," etc. Mr. Berryman informed him that the country in east of there was a likely country, and that he had been hunting a placer mine that he had seen many years before. Rigley camped there for the night, and in the evening Mr. Berryman described the Hump country to him, and told him about the placer claims he had once seen, and had just been hunting, and told him in a general way what portion of the country he thought they could be found in, and also informed him of the quartz they had seen on their trip, and that he believed said placer claims were within 10 or 15 miles of the Hump, down the hill south or southeast therefrom. Mallory was present, and took part in the conversation between Berryman and Rigley in the evening. This conversation lasted three or four hours, and was in regard to the trip Berryman had just returned from, and of the country he had seen. Mr.

Berryman testified as follows: "Mr. Rigley was asking questions about quartz, and we were telling him about the quartz Mallory and I had seen on the trip." The next morning after that conversation Mr. Berryman started for his home in the state of Washington. It appears that Mallory had a conversation with Rigley about that large vein of quartz that they had seen at Buffalo Hump, and that, after they moved to Sand creek, he showed him some of the specimens. He further testified: "I had a number of conversations with him before we made the contract. I told him of those big ledges, and the number of ledges, and this one in particular," —the last-mentioned being the one on which said mining claims are located. After Berryman left them, Rigley, Mallory, and a man by name of Cotter removed their camp to Sand creek. There they met the defendant Robbins and a man by the name of Mitchell. In a day or two thereafter Robbins and Mitchell moved their camp to Meadow creek, and Rigley and Mallory also went there to look for placer ground, and to see where Robbins and Mitchell were camped. Rigley and Mallory located a placer claim there, and took Robbins and Mitchell in said location. They then prospected that location until about the 20th of July. It did not prove to be of any value, and they abandoned it. Rigley and Cotter returned to their camp at Sand creek, and left Mallory with Mitchell and Robbins on Meadow creek. Mallory next saw Rigley on July 22d, when the latter was on his way to Grangeville. Rigley returned from Grangeville about July 27th. In the meantime he had sold a span of horses for $150, taking a check for $100 and a promissory note for $50. He thereafter got the check cashed. After his return he camped on Meadow creek, and, with Mallory, Robbins, and Mitchell, prospected a placer claim for a day or two, which they did not find profitable, and abandoned it. Mallory testified that they then broke up their partnership arrangements, and all started for Florence.

It appears that some conversation had been had between Rigley and Robbins in regard to going and looking for the placer ground that Berryman had told Rigley about. Mallory had talked to them about his going to Wind river, and doing the necessary work on the claims staked by him there, to complete the location thereof. They proceeded on their way to Florence, and camped near there on the 28th of July. Rigley testified that his intention was to go and look for placer ground, and, if he ran on anything else, he would stake it. On the 29th day of July Rigley went into Florence, and purchased $6.20 worth of provisions, and took them to his camp, with the intention of completing the bill the next day to be used by himself and Robbins on their intended prospecting trip to the Buffalo Hump country. On the morning of July 30th Rigley, Robbins, and Mallory went to Florence. When they arrived there, Mallory received a letter from his wife, requesting him to come home. He showed the letter to Robbins and Rigley, and told them he would have to go home. As to what was said in that conversation Mallory and Rigley do not agree. Mallory testified that he told them he would like to do something with the two ledges that he had staked on Wind river, and the one he had seen at their camp in the saddle of the Hump, and, as he would have to go home, wanted to know what kind of an arrangement he could make with them to go over there and "look after those ledges." Rigley's testimony is to the effect that Mallory wanted to know what arrangement he could make with them to do the necessary location work on the Wind river claims, as he had to go home. They told him they would do the work for him, and that, if he made anything out of the claims, and wanted to give them anything, all right; and, if they did not make anything out of them, it was all right any way. Rigley then requested Robbins to complete the grub bill, and that he did so by adding to what Rigley had purchased the day before. After the bill was

completed, and the amount of the bill ascertained, Rigley was about to take the amount out of his pocket, to hand to Robbins, to make the purchase, when Mallory said: "No, no; not much; you don't do that. I have given Jake Rice a quarter interest in these two claims to pay for grub and tools, and, if you boys do the work, that is enough. He gets a quarter interest for the grub and tools, and you do the work, and that is all I ask of you." Mallory thereafter went to see Rice, and returned, and said it was all right; and a son of Mr. Rice purchased provisions amounting in value to $9.20. Rigley testified as follows: "During these conversations when getting this grub ready to start out there to do the work on Mallory's claims on Wind river, nothing at all was said by any person about our going on to do any work under any arrangement with Rice or Mallory in the way of locating claims at Buffalo Hump." All of the direct evidence contained in the record in regard to the terms of said contract is from Mallory and Rigley. Mallory testified that the grub was furnished for the purpose of completing the locations on Wind river and the location of the ledge at the Hump, while that of Rigley is to the effect that it was furnished as the consideration for the work to be done, and which was thereafter done, by Rigley and Robbins on the Wind river claims. Mallory accompanied Rigley and Robbins to the Wind river claims, and remained with them one day, and thereafter Rigley and Robbins did the required work on said claims, and delivered the location notices to the son of Mr. Rice. They did not claim any interest in said locations for doing the work. Rice had no conversation with Rigley or Robbins in regard to said agreement or arrangement. The evidence on the part of Mr. Rigley shows that Mallory was intending to go to Wind river, and complete the location of some quartz claims there; that when they went into Florence on the morning of the 30th of July, and up to the time he received the letter from his wife, that was his

expressed intention, and it was also the intention and purpose of Rigley and Robbins to go prospecting into the Buffalo Hump country, ostensibly for the purpose of searching for the placer ground of which Berryman had told them, and for anything they might find; that Mallory was quite anxious to complete said locations by doing the 160 cubic-feet of work thereon required by law. From the testimony of Mallory it is evident that up to the time of the receipt of the letter from his wife no grub-stake contract had been suggested or entered into. Mallory accompanied Robbins and Rigley to the Wind river claims, and remained there one day, and after he left for home Robbins and Rigley did the work on the Wind river claims, and delivered the location notices to a son of Mr. Rice. They did not locate themselves in said claims, or claim any interest therein for doing said work. The record shows that when the Berryman party, of which Mallory was one, discovered any ledge on said trip that they thought of sufficient value, they located it, as on Wind river. They camped on or very near the Big Buffalo ledge for two or three days, with large quartz boulders all around their camp, and evidently neither of them thought said ledge worth locating. The record shows that Mallory did not consider said ledge of any value. R. J. McLean, apparently a disinterested witness, testified that he called Mallory's attention to the ledge on which the mines in dispute were subsequently located, and had a talk with Mallory about it. He testified: "I had some talk with Mr. Mallory about it [said ledge]. He came to our camp one night, and I says, 'There is a big ledge down there, if you want to locate it,—a quartz ledge.' He said that it was 'bull quartz,' and there wouldn't be a dollar in 160 acres of it." If that conversation did occur, it would show Mallory's opinion of said ledge, and would rebut the idea running through Mallory's testimony that he was constantly talking about said ledge. His testimony shows that he took a piece of quartz from said ledge, and carried it to

Florence with him, but that he did not think enough of it to have it assayed or tested, and did not show it to Rigley until they moved to Sand creek, if at all. The evidence shows that up to the 30th day of July he was much more anxious about the claims that he had discovered on Wind river than about the big ledge at the Hump. He was going to complete those locations, and went to Florence on the 30th of July for the purpose of getting grub to sustain him while doing the necessary work thereon. Robbins and Rigley went to Florence on that day to complete the purchase of a bill of grub (a part of which they had purchased the day before) that they contemplated taking with them for use on a prospecting trip to the Buffalo Hump to search for Berryman's lost placer mine, and whatever else they might find. Mallory, on his arrival in Florence, received a letter from his wife, requesting him to come home. The record fails to show, up to that time, that there was any intention on the part of Robbins and Rigley to go prospecting with Mallory on his and their joint account. It appears that Robbins, Mallory, Rigley, and one Mitchell together had been prospecting some placer ground just prior to July 28, 1898, and Mallory testified that they prospected a little the morning of the 28th, "and that they then broke up their partnership arrangements, and all started for Florence that evening." The trial court found that Mallory remained with Rigley and Robbins while they did said work, but the testimony of both Mallory and Rigley is to the effect that he remained there one day, and that they did a little prospecting, and the next day he left for home, and after that Rigley and Robbins did the location work on said claims. As to the terms and conditions of said contract, there is a direct conflict in the testimony of Mallory and Rigley, they being the only persons present when the contract was made, except Robbins, now deceased. There is some evidence in the record that tends to corroborate Mallory and some other that tends to corroborate Rigley. The affi-

davit made by Mallory in which he swears that Rice had no interest in the alleged grub-stake contract, his statements to numerous witnesses to the same effect, and other matters revealed by the record indicate that the utmost confidence cannot safely be placed in his veracity and truthfulness. The evidence, viewed as a whole, indicates that both respondents and appellants have done things and acts that look suspicious, and which show that they have shuffled to gain a point or avoid a responsibility in this matter. But, to give the most favorable view possible to all of the evidence for the respondents, the terms of the alleged contract are left in doubt and uncertainty, and for that reason specific performance cannot be decreed. Therefore the first error assigned by the appellants, which goes to the sufficiency of the evidence to support the facts found by the court, must be sustained.

As to the law of the case, counsel for appellants contend that, as respondents are seeking to hold the appellants as trustees of an undivided one-half of said mining claims, and to enforce the specific performance of an alleged prospector's or grub-stake contract, respondents cannot have a decree upon a bare preponderance of the evidence, and that they are not entitled to a decree unless their case has been clearly and satisfactorily proven, and all doubts cleared up; while counsel for respondents contend that in this class of cases the rule is well established that a mere preponderance of the evidence is all that is required. The trial court held that a preponderance of evidence was all that was necessary to establish plaintiffs' case. Counsel for appellants cite and quote from a large number of authorities in support of their contention. Counsel for respondents contend that nearly every case cited by appellants was an action to reform a written deed or instrument, or to have a trust declared contrary to the specific terms of a written instrument, and are not applicable to the case at bar. Counsel, however, concede that the cases of *Proudfoot* v. *Wightman,* 78 Ill. 556, and *Dewey* v. *Land Co.*

98 Wis. 83, 73 N. W. 566, require explanation, and those cases are explained by counsel by suggesting that the decisions in those cases are "simply the opinion of the court as to what the rule ought to be." We think, however, the correct rule is stated in those cases. After a most thorough examination of this question, and of the authorities cited, we conclude that the rule is well settled in a case like the one at bar that something more than a bare preponderance of the evidence is required to entitle the plaintiff to a decree declaring a resulting trust and for specific performance. In the first case above cited the court says: "In an ordinary chancery case a complainant is required to establish the allegations of the bill by a preponderance of the evidence, but in a case of this character * * * something more than a bare preponderance should be required." In *Dewey* v. *Land Co., supra* (which was a case to enforce specific performance of an oral agreement to convey land), it is said: "Specific performance is not a matter of strict right, but rests in the sound discretion of the court, and the contract sought to be enforced must be fully and clearly proved in all its parts. A mere preponderance of evidence is not sufficient." It is held in *Printup* v. *Mitchell,* 17 Ga. 567, that a parol contract for land, like the reformation of a deed by parol proof, should be made out so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the agreement. In *Johnson* v. *Quarles,* 46 Mo. 423, the plaintiff attempted to establish a resulting trust in land, and the court used the following language as to the evidence introduced, to wit: "While admitting such evidence for the purpose of creating this resulting trust, the chancellor has always required that it be clear and unequivocal." "The insecurity of titles, and the temptation to perjury, among the chief reasons demanding that contracts affecting lands should be made in writing, also imperatively require that trusts arising by operation of law should not be declared upon any doubtful evidence, or ever upon a mere preponderance of evi-

dence. There should be no room for a reasonable doubt as to the facts relied upon." See, also, *Ringo* v. *Richardson,* 53 Mo. 385; *Barbour* v. *Barbour,* 51 N. J. Eq. 271, 29 Atl. 148; *Association* v. *Brewster,* 51 Tex. 263; 2 Pom. Eq. Jur. § 1040. As to the evidence necessary to establish a resulting trust in land, the court, in *Reynolds* v. *Caldwell,* 80 Ala. 232, said: "The rule is that a trust of this nature, sought to be ingrafted upon lands by parol evidence, and such as result by operation of law must be supported by testimony not only entirely satisfactory, but clear and undoubted." In the case at bar plaintiffs are attempting to ingraft a resulting trust by oral evidence upon mining ground, the title to which, as against every one except the government of the United States, is admitted to be in the defendants, who are appellants here; and to contend that the rule herein laid down only applies to written instruments, and does not apply to titles to mining land acquired by location under the laws of the state and the United States, is attempting to point out a distinction in a matter where in fact no difference exists. The appellants' title rests on discovery and proper location, filing for record a proper notice of location, and complying with the law therein. The title results from a compliance with the law. The title is in appellants. Respondents seek to ingraft thereon a resulting trust, whereby they may be decreed to be the owners of an undivided half interest of, in, and to said three mining claims, and pray a specific performance of an alleged "grub-stake and information contract," for the alleged contract sued on is not alone a "grub-stake contract." As applied to respondent Rice, it is, but, as applied to Mallory, it is not, for it is alleged in the complaint that Mallory furnished "information" as his part of the consideration for said contract, and Rice furnished "grub" for his. If there is any authority that holds that a greater weight of evidence is necessary to ingraft a resulting trust on land acquired by location than on land acquired by deed, we have been unable to

find it, and counsel for respondents have not called our attention to it. In either case the evidence must be satisfactory, clear, and convincing. It must be so clear and certain as to leave no well-founded doubt in the mind of the court. The evidence of the respondents, when tested by that rule, will not entitle them to a decree. The admission of the testimony of Mallory and Rice as to the conversation with Robbins at the time of making said alleged contract and prior to his death is assigned as error. Counsel for appellants contend, under the provisions of subdivision 3, § 5957, Rev. St., that Mallory and Rice were not competent witnesses to testify to any matter of fact occurring before the death of said Robbins. Said section, inter alia, provides as follows: "The following persons cannot be witnesses: * * * (3) Parties or assignors of parties to an action or proceeding or persons in whose behalf an action or proceeding is prosecuted, against an executor or an administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person."

Counsel for appellants contend that this suit is founded on a claim or demand against the estate of Robbins, deceased, while counsel for respondents contend that it is not, but that it is an action to enforce a trust against the estate of the said deceased, and is not a claim or demand against said estate. Section 1880, Code Civ. Proc. Cal., is the same as section 5957, Rev. St., above cited, and under the provisions of said section the supreme court of California has held in *Myers* v. *Reinstein*, 67 Cal. 89, 7 Pac. 192, that an action to establish and enforce a trust against the estate of a deceased person is not a "claim or demand" against such estate. *Tyler* v. *Mayre*, 95 Cal. 160, 27 Pac. 160, sustains *Myers* v. *Reinstein*. But on rehearing (95 Cal. 163, 30 Pac. 197), the opinion consists of but eight lines, and states that the court is satisfied with the conclusion reached in 95 Cal. 160, 27 Pac. 160, but in the syllabus it is stated that *Tyler* v. *Mayre*, (Cal.) 27

Pac. 160, is overruled. In *Moore* v. *Schofield,* (Cal.) 31 Pac. 532, which was an action to enforce a trust, the supreme court apparently discredited the rule laid down in *Myers* v. *Reinstein, supra.* The court said, "It would, indeed, seem to be a claim or demand against the estate." However, in *Poulson* v. *Stanley* (Cal.) 55 Pac. 605, the case of *Myers* v. *Reinstein* is cited with approval. In that case the court says: "In *Myers* v. *Reinstein,* 67 Cal. 89, 7 Pac. 192, it was held that this provision of the statute did not render the plaintiff incompetent in an action to establish a resulting trust in certain property held by an estate. The court therefore did not err in permitting the witness to give testimony." In that case *Moore* v. *Schofield, supra,* is not referred to. If the supreme court of California intended in *Moore* v. *Schofield* to discredit *Myers* v. *Reinstein,* it evidently removes that discredit in *Poulson* v. *Stanley, supra.* The supreme court of Utah, in *Wood* v. *Fox* and *Whitney* v. *Fox,* 32 Pac. 49, under a statute the same as the above cited, held that an action to establish a resulting trust against the estate of a deceased person was a "claim or demand" against such estate,—which case was carried to the supreme court of the United States, and is reported in 166 U. S. 637, 41 L. Ed. 1145. In that case the plaintiff sought a decree declaring him to be the equitable owner of one-eighth of the Mansion House, situated in Detroit, Mich., and entitled to rents, issues, and profits thereof, as well as a part of 3,000 shares of mining stock and dividends thereon. The supreme court of the United States said, speaking through Justice Harlan: "We cannot doubt that the claims as asserted in this suit by Whitney are, within the meaning of the Utah statute, claims or demands against the estate of a deceased person. * * * The supreme court of Utah properly rejected the suggestion that such claim or demand was not against the estate of Lawrence. To say that the only issue here was whether the real property and stock described in the petition constituted a part of Lawrence's estate, and that no claim or demand was

asserted against the estate, would be to defeat what, it seems to us, was the manifest object of the statute. While, as said by this court in *Coulam* v. *Doull,* 133 U. S. 216, 10 Sup. Ct. 253, 33 L. Ed. 596, it is the ordinary rule to accept the interpretation given to a statute by the courts of the country by which it was originally adopted, the rule is not an absolute one, to be followed under all circumstances. We concur in the interpretation placed upon the Utah statute by the supreme court of Utah as one required by the obvious meaning of its provisions, and we do not feel obliged by the above rule to reject that interpretation because apparently the highest court of the state from which the statute was taken has in a single decision taken a different view." In that decision the supreme court of the United States declares that the interpretation placed upon said statute by the supreme court of Utah is the one required by the obvious meaning of its provisions, and refuses to follow the narrow, restricted, and technical construction placed upon said section by the supreme court of California. In *Myers* v. *Reinstein* the decision proceeds upon the theory that the letter of the statute must control, and leaves out of sight that beneficent rule laid down in the statute of California—the rule of the common law that statutes in derogation thereof are to be strictly construed—which it is held has no application to the statutes of that state, and that their provisions, and all proceedings under them, are to be liberally construed with a view to effect their objects and promote justice. And to hold, under the provisions of said section 5957, Rev. St., that this action is not a claim or demand against the estate of said Robbins, deceased, and permit respondents to testify as to a contract alleged to have been made with deceased during his lifetime, would defeat the manifest object and purpose of said statute. Under the law the legal title to an undivided interest in said mining claims was in the deceased at the time of his death, and was a part of his estate; and the respondents now claim to be the equitable

owners of an interest therein by reason of said alleged oral contract. Robbins, being dead, cannot testify as to the alleged contract, and said statute is intended to and does disqualify the respondents Rice and Mallory as witnesses to said contract. In the case of *Nasholds* v. *McDonell,* 55 Pac. 894, this court held that the provisions of said section 5957 did not apply to an action brought to establish a trust against the estate of a deceased person. On that point the only case cited in briefs of counsel was the case of *Myers* v. *Reinstein, supra,* and, as that point was not seriously controverted by the counsel for appellant, this court considered that case decisive on that point under the ordinary rule to accept the interpretation given to a statute by the courts of the state from which it was adopted. But upon a careful examination of that question we find that said statute became a law in this then territory June 1, 1875,—long before the decision of the case of *Myers* v. *Reinstein,* and some months prior to the decision in *Blood* v. *Fairbanks,* 50 Cal. 420. Hence the California decisions do not come within the rule above stated, and are only precedents, and have no more binding force upon this court than the decisions of the supreme court of Utah and that of the supreme court of the United States, both of which are in accord with the spirit and intent of the provisions of said statute. In *Moore* v. *Schofield,* 31 Pac. 532, the supreme court of California said that the decisions under said statute were upon the principle that "the letter of the statute must control." Under our system the spirit must control, and the statutes must be liberally construed with a view to effect their objects and promote justice. The object of said statute was to prevent the decimation and confiscation of a deceased person's estate upon the testimony of parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person as to matters of fact occurring

before the death of such person; and to hold that a claim for a resulting trust does not come within the intent of said statute would be to give that term a narrow and restricted meaning, much narrower than was given to it by Lord Coke and other eminent jurists since his time. Lord Coke said that the word "demand" is the largest word known to the law, save only the word "claim," and "a release of all demands discharges all rights of action." *Gray* v. *Palmer,* 9 Cal. 636. Chief Justice Nelson said in *In re Denny and President, etc., of Manhattan Co.,* 2 Hill, 223: "The term 'demand' is of much broader import than 'debt,' and would embrace rights of action belonging to the debtor, beyond those which could appropriately be called debts." Applying to the words "claim or demand," as used in said section, the definition or meaning of said term as given to them by Lord Coke and Chief Justice Nelson, and the plaintiffs in this case have no right of action if they have no claim or demand against the estate of the deceased, for "claim" embraces rights of action, and, as said by Lord Coke, a release of all demands discharges all rights of action. Therefore, if plaintiffs had no claim or demand against the estate of said deceased, they cannot evade the intent and purpose of said statute by attempting to ingraft a trust thereon whereby they can secure a large share of said mining claims, the legal title to which is in the name of said deceased.

The court erred in permitting said Mallory and Rice to testify in regard to conversations that they had with said Robbins, deceased, and that part of the opinion in *Nasholds* v. *McDonell, supra,* which holds that the provisions of said subdivision 3, § 5957, does not apply to an action brought to establish a trust is hereby overruled. However, in that case there was competent testimony to establish the trust alleged. As the record shows that no one was present at the time said alleged contract was made except appellant Rigley and Robbins, now deceased, and Mallory, and that the plaintiffs have

produced all of the evidence that they could produce in support of the allegations of their complaint, we conclude that no benefit can result to the respondents by a retrial of the case, and therefore reverse the judgment and decree of the court below, and remand the case, with instructions to the trial court to enter judgment in favor of the appellants and against the respondents in accordance with the views expressed herein, dismissing said action. Costs of this appeal are awarded to the appellants.

HUSTON, C. J., concurs. QUARLES, J., did not sit at the hearing of this case, and took no part in the decision thereof.

JOSEPHINE DESERANT v. CERILLOS COAL RAILROAD CO.

(178 U. S. 409; 20 Sup. Ct. Rep. 967. Supreme Court. May 28, 1900.)

[1]**Cause of accident a jury question.** The place of an explosion in a mine, and its cause, and what, if any, negligence the owner is guilty of, are questions for the jury, when the evidence offered requires their submission to the jury.

[2]**Congressional regulation of coal mining in the territories.** The act makes three requirements: 1. Ventilation of 3,300 cubic feet per minute for every fifty men; 2. Proper appliances to force the air to the breast; 3. Keeping all workings clear of standing gas; and if either of these three be neglected and injury occurs, defendant is liable.

The act peremptory. The act does not give to mine owners the privilege of reasoning on the sufficiency of appliances for ventilation, or leave to their judgment the amount of ventilation that is sufficient for the protection of miners.

[3]**It does not allow standing gas,** but requires the mine to be kept clear of it, and if this is not done the consequences of neglecting it cannot be excused because some workman may disregard instructions.

[4]**It is the master's duty to furnish safe appliances** and safe working places.

[5]**Where the negligence of a fellow servant contributing with** the neglect of duty of the master produces the injury, the master is liable.

Instructions construing the Congressional mine regulations and the law of "safe place," reviewed and held erroneous.

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[1]*Cause of Accident.* Defendant held in damages for death occasioned by cave, deceased being a new man and defendant having full knowledge of the treachery of the ground. *Bertha Co.* v. *Black*, 88 Va. 303; 13 S. E. 452.

Scale falls partly because weak and partly by fresh shaking: If the original negligent weakness aided the fall defendant was liable. *Freeman* v. *Sand Co.*, 25 Mont. 194; 64 Pac. 347.

The approximate cause of injury to a miner at the bottom of a shaft from fall of a bucket caused by fellow servant's negligence, is such negligence—and not defendant's failure to supply a break which would have checked the fall. *Luman* v. *Golden Co.* 140 Cal. 700; 74 Pac. 308.

Defendant owner of gas well, held for accident resulting from horse on highway scaring at sudden blowing off of the well. *Snyder* v. *Philadelphia Co.* —W. Va. —; 46 S. E. 366.

Error to the Supreme Court of the Territory of New Mexico to review a decision affirming a judgment for defendant in an action for damages caused by the explosion of the mine. Reversed.

See same case below, 9 N. M. 495; 55 Pac. 290.

The facts are stated in the opinion.

NEILL B. FIELD and F. W. CLANCY, for plaintiff in error.

ROBERT DUNLAP, E. D. KENNA, and R. E. TWITCHELL, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court:

This action is consolidated of three, brought by plaintiff in error, who was plaintiff in the court below and may be so called here, as administratrix of the estates respectively of her husband, Henri Deserant, and her sons Jules Deserant and Henri Deserant, Jr.

The actions were for damages for the deaths of her said intestates by an explosion in a mine owned by defendant, and

Verdict upheld where injury was caused by splinter flying from hammer. *Robbins* v. *Big Circle Co.* — Mo. —; 79 S. W. 480.

Mule shied and car struck rotten timber, which brought the roof down: *Held* a case for plaintiff. *Koltinsky* v. *Wood*, 23 Ky. L. R. 1665; 65 S. W. 848. Like ruling on similar accident. *Silliman* v. *Marsden*, (Pa.); 9 Atl. 639.

Where there is a want of proof as to cause of accident (as by destruction of the apparatus) it is a question for the jury to say where was the fault. *Dobbins* v. *Brown*, 1 N. Y. S. 360.

[2]*Statutory Regulations.* Whether the man-escape required by statute was in proper form, or in proper condition: *Held* a jury question. *Cambria Co.* v. *Shaffer*, (Pa.); 8 Atl. 204.

Contributory negligence no defence against statutory action for violation of mine regulation act. *Catlett* v. *Young*, 143 Ill. 74; 32 N. E. 447. *Durrant* v. *Lexington Co.*, 97 Mo. 62; 10 S. W. 484.

which explosion was alleged to have been caused by the negligence of defendant in error. The action was based upon a statute of New Mexico, which gives an action for damages to the personal representatives of a person whose death is caused by the wrongful act of another, if the person causing the injury would have been liable to an action for damages if death had not ensued.

There were two trials, both by jury, in the district court of the territory. The first resulted in a verdict and judgment for plaintiff. They were reversed by the supreme court of the territory. 9 N. M. 49, 49 Pac. 807. The second resulted in a verdict and judgment for defendant. They were affirmed by the supreme court of the territory. 9 N. M. 495, 55 Pac. 290. This writ of error was then sued out.

There is no dispute about the explosion or that the deaths of plaintiff's intestates were caused by it. The dispute is as to the cause of the explosion and the responsibility of defendant for it.

The evidence presents long and elaborate descriptions of

A statute cannot make a defendant liable for negligence of inspector selected for him by the law. *Durkin* v. *Kingston Co.* 171 Pa. 193; 33 Atl. 237.

Violation of statute by defendant concurring with negligence of fellow servant: Defendant liable, *Russell* v. *Dayton Co.* 109 Tenn. 43; 70 S. W. 1.

Imposition of a special duty on coal mine owners does not relieve them from other duties incident to proper care to prevent accidents. *Schmalstieg* v. *Leavenworth Co.* 65 Kans. 753; 70 Pac. 888.

Construction of Illinois statute requiring door keepers at certain passages in coal mines. *Himrod Co.* v. *Stevens*, 203 Ill. 115; 67 N. E. 389.

Construction of Missouri act allowing damages for negligent death, as to proper parties and essentials of complaint. *Cole* v. *Mayne*, 122 Fed. 836.

The statutory suit for damages by legal representatives of party killed by negligence is transitory and may be brought in another state. *Utah Co.* v. *Diamond Co.* 26 Utah 299; 73 Pac. 524. *Smith* v. *Empire State Co.* 127 Fed. 462. Contra *Vaughn* v. *Bunker Hill Co.*, 126 Fed. 895.

the mine, with its "slopes, air shafts, entries, cross cuts, air courses, conduits, and break throughs."

We do not think that it is necessary to repeat the descriptions. There is no controversy about them. The issue between the parties is as to the amount and sufficiency of ventilation, its obstruction, the accumulation of explosive gases, their negligent ignition, whether by a fellow servant of plaintiff's intestates or by a representative of the defendant, making it liable, or whether the explosion was of powder accidently ignited.

The method of ventilation was by machinery causing a circulation of air through the mine and up to the face of the working places, for the purposes of rendering harmless or expelling the noxious gases.

It is contended by plaintiff that the machinery was insufficient for that purpose, the employees of the defendant were inefficient and negligent, and that the air shafts had been permitted to become obstructed, whereby gases accumulated, and

Neglect of statutory duties is negligence *per se*. *Diamond Co.* v. *Cuthbertson*, — Ind. App. —; 67 N. E. 558.

The statutory requirement of a safety gate at the top of a shaft means such a device as will prevent an involuntary entrance into the shaft—not a covering which will prevent anything falling down the shaft. *Jacobson* v. *Smith*, — Iowa —; 98 N. W. 773.

[3]*For cases of explosion and bad ventilation, see Portland Co.* v. *Flaherty*, and notes, 21 M. R. —.

[4]*Safe machinery and safe place to work. Risks of the trade. Degree of care.*

Duty of master to see that rope is safe. *Donnelly* v. *Booth Co.*, 90 Me. 110; 37 Atl. 874.

Defendant not liable for latent defect in wrought iron of his tackle. *Lyons* v. *Knowles* (Cal.), 32 Pac. 883.

A trammer without objection was working in a stope: *Held* that he took the risks of the trade. *Paule* v. *Florence M. Co.*, 80 Wis. 350; 50 N. W. 189.

Miner working under scale: *Held* to assume the danger as a miner's risk. *Heald* v. *Wallace*, 109 Tenn. 346; 71 S. W. 80; *Dickason Co.* v. *Unverferth*, 30 Ind. App. 546; 66 N. E. 579.

Bunkhouse built at the mouth of a tunnel caught fire, which ex-

stood in the mine and exploded on the 27th of February, 1895, causing the deaths of plaintiff's intestates.

The means of ventilation was a fan at the entrance of the mine, which by its revolutions exhausted the air in the mine, and outside air rushed in through the passages of the mine, and was directed where desired by means of curtains called "brattices."

It is claimed there were defects in those appliances, whereby there were leaks in the circulation of the air, and besides that water had been allowed to accumulate in the fourth left air course, which so interrupted the quantity of air which passed into room 8 of the fourth left entry that the air did not go to the face of that room, but feebly passed around the brattice at a distance of 12 or 14 feet, thus permitting the accumulation of a dangerous body of gas, until it passed beyond the danger signals, which may have been put into the room by the fire boss, and that Donahoe, the day foreman, and Flick and Kelly, all miners, entered the room on the day of the ex-

tended to the timbers in the tunnel, and the smoke suffocated plaintiff's decedant: *Held* a risk assumed by the miner. *Harvey* v. *Mountain Pride Co.* 18 Colo. App. 234; 70 Pac. 1001.

The miner assumes special risk of attempting to fix place already known to be dangerous. No difference that danger was caused by original neglect of defendant. *Moon Anchor Co.* v. *Hopkins*, 111 Fed. 298. Thayer J., dissenting. *Finalyson* v. *Utica M. Co.*, 67 Fed. 507.

Where a laborer is ordered to perform more dangerous duty the risk is not such a risk as he assumes under his employment. *Cons. Stone Co.* v. *Redmon*, 23 Ind. App. 319; 55 N. E. 454.

Servant injured while in employ, but temporarily on his own business, may recover. *Adams* v. *Iron Cliffs Co.*, 78 Mich. 271; 44 N. W. 270.

Fall of roof of drift; master not absolutely bound to furnish safe place to work. That would make him an insurer. *Grant* v. *Varney*, 21 Colo. 329; 40 Pac. 771.

Employing insufficient help may of itself be ground of negligence. *South West Co.* v. *Smith's Admr.* 85 Va. 306; 7 S. E. 365; 17 Am. St. R. 59.

Employee takes the risk of the business but not the risk from

plosion, with naked lamps, and ignited the gas before they saw or had an opportunity to see the danger signal. The employees of the mine consisted of miners, rope riders, mule drivers, track men, and "company men." The latter were paid by the day, and worked under the order and immediate supervision of the foreman or pit boss, while the miners were paid by the ton, and were subject to general supervision by the foreman. Besides these, there was a mine superintendent, day foreman or pit boss, night foreman or pit boss, day fire boss and night boss. There was also a mine inspector, who lived in Kansas, and periodically visited the mine and other mines owned by defendant.

It is claimed that the mine foreman and fire bosses knew of the gas in room 8, and that the deceased miners did not know it, nor have means of knowing it.

The mine was inspected day and night respectively by the day and night fire bosses, and it was the duty of each to ad-

neglect of the master's duty. *Cherokee Co.* v. *Britton*, 3 Kan. App. 292; 45 Pac. 100.

Servant not bound to critical examination of the hoisting bucket—he is entitled to rely upon the master's duty to provide reasonably safe appliances. *Brazil Co.* v. *Gibson*, 160 Ind. 319; 66 N. E. 882.

Where room dressers are appointed in a coal mine with authority to direct the miners in what room to work, the miner has a right to rely on their judgment, that the room where set to work, is safe. *St. Bernard Co.* v. *Southard*, (Ky.); 76 S. W. 167.

Quarry company used only such cars as were furnished by R. R. *Held* liable for defect in car; workmen not bound to jump when brake gives way. *Spaulding* v. *Flynt Co.*, 159 Mass. 587; 34 N. E. 1134.

Miner not charged with keeping roof in repair, nor bound to make inquiries. *Blazenic* v. *Iowa Co.*, 102 Ia. 706; 72 N. W. 293.

Right of action continues while servant is leaving the mine. Servant is not chargeable with negligence for defect which it was not his business to look out for. *Whatley* v. *Zenida Co.*, 122 Ala. 118; 26 So. 124.

Employee has the right to assume that appliances are safe. *Tennessee Co.* v. *Currier*, 108 Fed. 19.

Whether plaintiff's or defendant's duty to support roof should be

vise each miner as he came in of the condition of his working place, and no miner was permitted into the mine to work until so advised.

The gas is explosive when mixed with certain proportions of atmospheric air. It is lighter than air, and therefore dispelled by a current of air, and this was the means necessary to be employed to disperse the gas. The gas when it explodes moves against the opposing current of air. In other words, expends its force in the direction from which the air comes.

On Sunday night Kilpatrick, the foreman, discovered enough gas in room 8 to crack his safety lamp, but he did not regard it as sufficient to mark the place dangerous.

On Monday morning (the explosion was on Wednesday) the day fire boss found gas in room 8, and put a danger mark above the last cross cut, but did not go back to the room again, although he knew that it was one of the worst rooms in the mine for gas. He testified that he considered the danger mark sufficient.

left to jury under the proof as to the custom of the mine and of the contract. *Sandy River Co.* v. *Caudill*, 22 Ky. L. R. 1175; 60 S. W. 180.

Workman has the right to presume that the roof of the gangway is safe. *Himrod Co.* v. *Clark*, 197 Ill. 514; 64 N. E. 282.

It is the duty of the colliery to keep its gangways inspected. *Ashland Co.* v. *Wallace*, 19 Ky. L. R. 849; 42 S. W. 744; 43 S. W. 207.

Discussion of the duty of master to provide or attempt to provide a "safe place to work." *Blondin* v. *Oolitic Q. Co.*, 11 Ind. App. 395; 37 N. E. 812; 39 N. E. 200. *Linton C. Co.* v. *Persons*, 11 Ind. App. 264; 39 N. E. 214.

Where a miner is hurt by the slipping of the dump car, it being the duty of the miner himself to prevent such slipping and manage the car, the risk was one which he assumed and for which he cannot recover. *Carroll* v. *Pennsylvania Coal Co.* (Pa.) 15 Atl. 688.

Where an accident was caused by the removal of brakes from a car by a wrong doer the employing company is not liable. *Ebright* v. *Mineral R. & M. Co.* (Pa.) 15 Atl. 709.

A workman walking under a hoist when he knows cages are going up and down constantly takes the entire risk. *McDonald* v. *Rockhill Co.*, 135 Pa. 1; 19 Atl. 797.

On Monday night before the explosion, Ray, the night fire boss, was at the face of room 8, and found no fire marks, but found a little gas, and put fire marks in the room. He inspected the mine on Tuesday, but did not visit room 8.

Donahoe, mine foreman, Flick and Kelly, two "company men," were killed by the explosion, and their bodies were found in or near room 8.

The conclusion which plaintiff claimed to be established by the evidence is, that Flick and Kelly went with Donahoe, under whose direction they worked, into room 8 with naked lights, and that an explosion was caused by the gas in the room coming in contact with the lights.

The defendant, on the contrary, contended that the "explosion was of some kind or other at or in the neighborhood of room 16 in the fourth left entry of the mine, where the deceased were working as coal miners." It is claimed that the cause of the explosion is altogether of conjecture and surmise, and that the greatest evidence or effect of explosion and fire

Employee accepts the risks incident to the employment and not chargeable to want of care. *Drew* v. *Gaylord* (Pa.) 4 Atl. 214.

The servant has the right to believe that his master has performed all duties required of him and provided a safe place to work. *Momence Co.* v. *Turrell*, 205 Ill. 515; 68 N. E. 1078. *Davis* v. *Turner*, 69 Ohio St. 101; 68 N. E. 819.

Employer furnishing safe rope to contractors is not liable for rope becoming unsafe by wear and tear. *Central Co.* v. *Bailey* (Ky.) 76 S. W. 842.

The negligence of the master is not one of the risks of the trade which the servant assumes. *Hone* v. *Mammoth Co.* — Utah —; 75 Pac. 381.

Miner hurt by unknown missile falling down shaft from unknown cause: *Held* a risk of the trade. *Jacobson* v. *Smith*, — Iowa —; 98 N. W. 773.

The miner does not assume unusual and not obvious risks induced by employer's negligence. *Garity* v. *Bullion-Beck Co.*, — Utah —; 76 Pac. 556.

Employer bound to provide sufficient light. *Central Co.* v. *Pearce*, (Ky.); 80 S. W. 449.

No duty on the owner can be delegated to an agent so as to relieve

appeared in the neighborhood of rooms 16 and 17, in the entry way thereabout, and that some powder cans were found exploded, and coal dust was found coked on some of the pillars on the back of the car, and a car loaded with coal was moved several feet off the track. It is hence conjectured that the explosion was caused by some negligent or accidental ignition of powder which instantly set fire to the coal dust, which more or less impregnated the air and the entry ways, and of particles of gas which might be found in the hollows and crevices; so that death would be caused by concussion, or by the after damp caused by the explosion. Or it is conjectured again that the explosion might have been caused by some miner, while working, suddenly striking a seam or body of gas, which was ignited by his light, and thus ignited powder near at hand.

At the close of the testimony the plaintiff and the defendant asked for peremptory instructions for their respective sides, which were refused.

the owner from personal responsibility. He assumes the negligence of his delegates. *Cherokee Co.* v. *Britton*, 3 Kans. App. 293; 45 Pac. 100. *Western Co.* v. *Ingraham*, 70 Fed. 219. *Costa* v. *Pacific Co.*, 26 Wash. 138; 66 Pac. 399.

Mine owner specially responsible for safe timbering and the doctrine of fellow servant has no application in such case. *Western Co.* v. *Ingraham, supra.*

Degree of care required as to gangways, shaft coverings, etc. *Sangamon M. Co.* v. *Wiggerhaus*, 122 Ill. 279; 13 N. E. 648.

Duty of foreman to test scales. *McMillan Co.* v. *Black*, 89 Tenn. 118; 14 S. W. 479.

Accident from fall of old trestle supports where defective timbers could only be known by cutting into them, not wilful negligence. *Reinder's Admr.* v. *Blick Co.* 12 Ky. L. R. 30; 13 S. W. 719.

In coal mine cases where loose rock falls from the roof, defendant's previous knowledge of defective condition of roof must be shown, or that by ordinary care it could have been discovered. *Cherokee Co.* v. *Britton*, 3 Kans. App. 292; 45 Pac. 100.

Owner not bound to renew old planking in the stopes such as is customary to let go to decay. *Cook* v. *Bullion Beck Co.*, 12 Utah 51; 41 Pac. 557.

The assignments of error are based on exceptions to evidence and on exceptions to instructions.

In passing on the case the supreme court of the territory said that it was "unnecessary for us to consider the objections urged to the instructions given by the court below. In our opinion they were all in favor of the plaintiff, as the court should have granted the motion of the defendant, and instructed the jury to find the defendant not guilty."

In support of this conclusion it stated the theory of the plaintiff to be that the explosion was caused by an "accumulation of water previous to the explosion in a low place in the fourth left air course,—a sufficient quantity of pure air was not going to the face of the workings in the fourth left entry to remove and expel the noxious gases; that Kelly and Flick, who were company men, that is, men who were paid by the day and not according to what work they did, acting under instructions from Donahoe, the day pit-boss, went with him or by his direction into room 8 to remove a railroad track,

An untimbered stope is not a safe place to work which the mine owner is bound to provide. *Petaja* v. *Aurora Co.*, 106 Mich. 463; 66 N. W. 951.

Duty of the mine owner to keep plenty of available timber on hand. *Coal Co.* v. *Estievenard*, 53 Oh. St. 43; 40 N. E. 725.

Duty of mine owner to support roof. Previous falls of scale no proof of contributory negligence. *Island Co.* v. *Risher*, 13 Ind. App. 98; 40 N. E. 158.

Servant not bound to inspect the premises for latent defects—case of blowing out partition between coal chambers. *Summit Co.* v. *Shaw*, 16 Ind. App. 9; 44 N. E. 676. The negligence in such a case is in allowing the barrier to become too thin. *Eureka Co.* v. *Wells*, 29 Ind. App. 1; 61 N. E. 236.

[5]*Joint negligence or two causes of accident.*

Negligence of fellow servant no defense when two causes bring about the accident and defendant is culpable as to one of them. *Handley* v. *Daly Co.*, 15 Utah 176; 49 Pac. 295. *Jenkins* v. *Mammoth Co.*, 24 Utah 513; 68 Pac. 845.

Negligence of fellow servant no defense where defective machinery was the original cause. *Keast* v. *Santa Ysabel M. Co.*, 136 Cal. 256; 68 Pac. 771.

carrying naked lights, and that such lights set fire to the gas which had accumulated there by reason of the insufficiency of air, and caused the explosion. This theory is purely speculative, and is not supported by the evidence. It cannot be positively proved what was the initial point of the explosion or what caused it. In fact, the evidence goes to show, from measurements taken at various times by the superintendent of the mine, the pit-boss, and the United States inspector, that sufficient air was going through the fourth air course and mine to make it safe. Indeed, the evidence goes further, and shows that after the explosion and on the day of the investigation by the coroner's jury, and while much of the *dèbris* caused by the explosion was still in the fourth left air course, a sufficiency of air was passing through it over the water and *dèbris* through the low place, which was claimed by the plaintiff to have been obstructed by water, for the proper ventilation of the entry and its rooms and the expulsion of all harmful gases, and for the men and animals working there at the time of the explosion. There is no evidence that the condition of the fourth left air course was the direct or proximate cause of the explosion, and for the plaintiff to recover this must be proved by a preponderance of evidence."

Negligence of fellow servant no defense where the master himself also negligent. *Loveless* v. *Standard M. Co.* 116 Ga. 427; 42 S. E. 741. *Czarecki* v. *Seattle Co.* 30 Wash. 288; 70 Pac. 750. *Tetherton* v. *U. S. Talc Co.* 58 N. Y. S. 55.

Where accident chargeable to united negligence of master and of co-employee the master is liable. *Belleville Co.* v. *Mooney*, 60 N. J. L. 323; 38 Atl. 835. *Costa* v. *Pacific Co.* 26 Wash. 138; 66 Pac. 398.

The master is responsible where the injury occurs from the concurrent negligence of the master and a fellow servant. *Tanner* v. *Harper*, — Colo. —; 75 Pac. 404.

Status of parties where the party killed was in the employ of the mining company, but the accident resulted from handling cars of the railroad shipping company and the cause of injury was the negligence of the shipping company, not an employer. *Smith* v. *Centennial Co.* — Utah —; 75 Pac. 749.

The court also held that Flick, Kelly, and Donahoe were fellow servants of the deceased; therefore, if the contention of the plaintiff was true, that the gas was ignited by their negligence, the defendant had no cause of action.

We have read the evidence, and we cannot concur with the supreme court of the territory that the trial court "should have granted the motion of the defendant, and instructed the jury to find the defendant not guilty." It was for the jury to determine from the evidence the place of the explosion and its cause, and what, if any, negligence the defendant was guilty of, and the evidence offered on the issues required the submission of those questions to the jury.

The effect of the act of Flick, Kelly, and Donahoe we will consider hereafter.

The trial court, in giving instructions to the jury, read section 6 of the act of Congress of March 3, 1891, which is as follows:

"By section 6 of an act of Congress, approved March 3, 1891 [26 Stat. L. 1104, chap. 564], it is provided as follows:

"'Sec. 6. That the owners or managers of every coal mine at a depth of one hundred feet or more shall provide an adequate amount of ventilation of not less than fifty-five cubic feet of pure air per second, or thirty-three hundred cubic feet per minute, for every fifty men at work in said mine and in like proportion for a greater number, which air shall by proper appliances or machinery be forced through such mine to the face of each and every working place so as to dilute and render harmless and expel therefrom the noxious or poisonous gases, and all workings shall be kept clear of standing gas.'"

The court then instructed the jury as follows:

"If, therefore, the jury believe from the evidence that the defendant, the Cerillos Coal Railroad Company, was operating a coal mine at a depth of more than 100 feet below the surface of the earth, and that the plaintiff's intestates respectively were employed by the

defendant in the operation of said coal mine, it was, by reason of said act of congress, the duty of the defendant to provide an adequate amount of ventilation of not less than 35 cubic feet of pure air per second and 3,300 cubic feet per minute for every fifty men who worked in said mine, which air should have been, by proper appliances or machinery, forced through such mine to the face of each and every working place therein, so as to dilute and render harmless and expel therefrom the noxious or poisonous gases, and all workings of such mine should have been kept clear of standing gas in dangerous quantities; and if the jury believe from the evidence that the defendant, the Cerillos Coal Railroad Company, failed or neglected to provide an adequate amount of ventilation so as to dilute and render harmless and expel from the said mine the noxious poisonous gases which were generated therein, or to keep the working places of said mine clear of standing gas, such failure on the part of the defendant may be considered by the jury as evidence of negligence on the part of the defendant.

* * * * * * * * * * *

"9. Negligence is defined to be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attending circumstances. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers therein. All occupations producing articles or works of necessity, utility or convenience may undoubtedly be carried on, and competent persons, familiar with the business and having sufficient skill therein, may properly be employed upon them, but in such cases where the occupation is attended with danger to life or limb, it is incumbent on the promoters thereof, and the employers or others thereon, to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect from which injury follows to the persons engaged, such promoters and employers may be held responsible and mulcted to the extent of the injury inflicted, if any. Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition of their pursuit without such safeguards. Indeed, it may be laid down as a legal principle that in all occupations attended with great and unusual danger there must be used all appliances readily attainable known to science for

the prevention of accidents, and that a neglect to provide such readily attainable appliances, and to keep the same in fit and suitable condition, will be regarded as proof of culpable negligence.

"10. I charge you, gentlemen, that it is the duty of the master to use reasonable care and diligence to provide a reasonably safe place in which his servants shall perform their respective duties, and also to use reasonable care and diligence to provide reasonably safe appliances for the protection of his servants, and to use reasonable care and diligence to keep such appliances in a reasonably safe condition for the protection of his servants; and the master cannot, by the delegation of any part of his duty to an agent or servant, relieve himself of responsibility for injuries to his servants arising from the neglect of this duty. Any agent or servant of the master, appointed by him for the purpose of looking to the safety of such appliances without regard to the rank or station of such agent or servant, is the representative of the master for such purpose, and the negligence of any such agent or servant in such matters is, in contemplation of the law, the negligence of the master, and the master is liable for any damage occasioned thereby.

"11. Although you may believe from the evidence that the fellow servants of the deceased by their negligence contributed to the bringing about of the explosion in which deceased were killed, yet, if you also believe from the evidence that the negligence of defendant also contributed to the same result, you must find a verdict in favor of the plaintiff, unless you believe from the evidence that plaintiff's intestates, or one of them, knew, or had means of knowledge, of such negligence of defendant, and, notwithstanding such knowledge or means of knowledge, continued to work in the mine of defendant.

"12. The law requires that the defendant shall keep the workings in its mine clear of standing gas, and if you believe from the evidence the defendant failed to keep the workings in its mine clear of standing gas, and that such failure contributed to the deaths of the deceased, then you are justified in believing defendant guilty of negligence, and you must find a verdict in favor of the plaintiff, unless you believe from the evidence that the plaintiff's intestates or one of them knew of the existence of such gas and continued to work in the mine of defendant with such knowledge.

"13. If the jury believe from the evidence that the plaintiff's intestates knew or had reason to know that dangerous bodies of gas were permitted to accumulate in the open places of defendant's mine and to remain for a period of thirty-six hours or more, without any effort on the part of the agents and the servants of defendants to move the same, and that no precautions against the explosion of such gases were accustomed to be taken except to mark the open place where such gas might be with a danger mark, and plaintiff's intestates, notwithstanding such knowledge or means of knowledge,

continued to work in said mine, the plaintiff's intestates thereby assumed the risk incident to such method, and cannot recover if their fellow servants ignited such gas by going over or disregarding such fire mark.

"14. If you believe from the evidence that the explosion originated in room 8 of the fourth left entry of the mine in consequence of the accumulation in said room of a body of dangerous gas, merely guarded by a fire mark or danger signal for thirty-six or forty-eight hours before the explosion, and that plaintiff's intestates did not consent or agree to work in said mine with places dangerous because of gas merely guarded by fire marks or danger signals for thirty-six or forty-eight hours, then plaintiff is entitled to recover in each case, although you may also believe that said body of dangerous gas was ignited by the negligence of fellow servants of plaintiff's intestates."

The main charge of the court was not objected to. The objections were to certain instructions given at the request of the defendant.

They were as follows:

"1. The jury are instructed that what was required of the defendant in the conduct of its mining business, in caring for the miners employed by and engaged in working its mine, was the adoption and use of appliances and methods reasonably sufficient for the protection of the miners against any dangers attending the operation of its mine that were obvious or might with reasonable diligence have become known; and, in the absence of evidence to the contrary, it is presumed that the defendant performed its entire duty towards the miners in that respect."

"6. Although the jury may believe from the evidence that gas of the quantity mentioned in the evidence had accumulated and was allowed to remain in room 8 for the time stated in the evidence, and believe from the evidence that the explosion testified to originated in room 8, and further believe from the evidence that signals of the kind described in the evidence warning against entry into said room were placed in such a manner as to be observed by the deceased Flick and Kelly, and the meaning and significance of such signal was understood by them, and such signal was known to be in use by the miners engaged in working in said mine, and that the use of such signal was understood by such miners to inform them of the presence of gas in dangerous quantity; then, if the jury believe from the evidence that such explosion was caused by Flick and Kelly entering said room with a naked light, the defendant is entitled to, and you should render, a verdict in its favor."

"10. The burden of showing negligence on the part of the defendant, that caused the death of the persons for which this action is brought, is upon the plaintiffs, and evidence has been introduced for the purpose of showing an obstruction of the air course through which that portion of the mine where the deceased persons worked was ventilated. The presumption is that the mine was properly and sufficiently supplied with air, unless the evidence offered establishes the contrary, and to do this the jury must find, not only a partial obstruction of the air course, but that the obstruction was of such a nature and to such an extent as to prevent the passage of the necessary quantity of air; and if, upon the whole testimony, the jury believe that, notwithstanding the partial obstruction existed, there was still space enough in the air course unobstructed to allow the proper and sufficient ventilation of the mine and of the fourth left entry where such deceased persons were at work, you will find a verdict for the defendant, unless you find from the evidence that the negligence of the defendant in some other way caused or contributed to the death of such persons.

"11. If the jury shall believe from the evidence that the defendant permitted fire gas to accumulate in room 8 of its mine, and that such gas would not produce any injury until ignited, and that it was ignited by Flick and Kelly, or either of them, by going into the said room with a naked light (contrary to the rules and orders of the defendant), and by such naked light the fire gas was ignited and exploded, causing the death of plaintiff's intestates, such explosion and injury were directly and immediately caused by the act of the fellow servants of plaintiff's intestates, and not by the negligence of defendant, and defendant is not liable therefor; and a verdict should be rendered for the defendant."

The act of Congress makes three requirements—

(1) Ventilation of not less than 55 feet of pure air per second, or 3,300 cubic feet per minute, for every fifty men at work, and in like proportions for a greater number; (2) proper appliances and machinery to force the air through the mine to the face of working places; (3) keeping all workings free from standing gas. If either of these three requirements was neglected, to the injury of plaintiff's intestates, the defendant was liable.

We think the instructions numbered 1, 6, and 11, given at the request of the defendant, ignored the obligations of the

act of Congress, and are so far inconsistent with the other instructions that they tended to confusion and misapprehension—making the duty of the mine owner relative, not absolute, and its test what a reasonable person would do, instead of making the test and measure of duty the command of the statute. The act of Congress does not give to mine owners the privilege of reasoning on the sufficiency of appliances for ventilation or leave to their judgment the amount of ventilation that is sufficient for the protection of miners. It prescribes the amount of ventilation to be not less than 55 cubic feet per second; it prescribes the machinery to be adequate to force that amount of air through the mine to the face of every working place. Nor does it allow standing gas. It prescribes, on the contrary, that the mine shall be kept clear of standing gas. This is an imperative duty, and the consequence of neglecting it cannot be excused because some workman may disregard instructions. Congress has prescribed that duty, and it cannot be omitted and the lives of the miners committed to the chance that the care or duty of someone else will counteract the neglect and disregard of the legislative mandate.

But, aside from the statute, it is very disputable if the instructions were correct. It is undoubtedly the master's duty to furnish safe appliances and safe working places, and if the neglect of this duty concurs with that of the negligence of a fellow servant, the master has been held to be liable. *Clark* v. *Soule,* 137 Mass. 380; *Cowan* v. *Chicago, M. & St. P. R. Co.* 80 Wis. 284, 50 N. W. 186; *Sherman* v. *Menominee R. L. Co.* 72 Wis. 122, 1 L. R. A. 173, 39 N. W. 365. See also *Hayes* v. *Michigan C. R. Co.* 111 U. S. 228, 28 L. Ed. 410, 4 Sup. Ct. 369; *Atchison, T. & S. F. R. Co.* v. *Reesman,* 19 U. S. App. 596, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768; *Sommer* v. *Carbon Hill Coal Co.* 59 U. S. App. 519, 89 Fed. 54, 32 C. C. A. 156; *Flike* v. *Boston & A. R.*

Co. 53 N. Y. 550, 13 Am. Rep. 545; *Booth* v. *Boston & A. R. Co.* 73 N. Y. 38, 29 Am. Rep. 97; *Grand Trunk R. Co.* v. *Cummings,* 106 U. S. 700, 27 L. Ed. 266, 1 Sup. Ct. 493.

The principle was stated in the general charge of the court, but it was materially modified in the application, and not at all considered in giving the instructions requested by the defendant.

No exceptions, however, were taken to any portion of the general charge of the court, and no question arising thereon is open to our review on this writ of error. But as we remand the case for a new trial on account of the errors which we have pointed out irrespective of the general charge, we deem it best to say that we must not be understood as affirming anything contained in instructions numbered 11 and 12, or any other instruction which conflicts with the principles announced in *Texas & P. R. Co.* v. *Archibald,* 170 U. S. 665, 671, 42 L. Ed. 1188, 1191, 18 Sup. Ct. 777.

We do not intend to express an opinion as to the facts of the case, or of any fact, or of any of the theories of the explosion. We only mean to decide that on the issues made and on the evidence, and regarding the provisions of the act of Congress, the instructions given by the trial court to the jury were erroneous.

The judgment of the Supreme Court of the Territory is reversed, and the case remanded, with instructions to reverse the judgment of the District Court and direct a new trial.

[1]JOSEPH H. BEALS v. JAMES J. CONE ET AL.

(27 Colorado 473; 62 Pac. 948. Supreme Court. June 4, 1900.)

The adjudication in the land office upon a protest that the applicant is not in position to press his application for patent is not *res-adjudicata* of the same facts involved in that issue where the parties appear as suitors in a suit supporting an adverse claim.

Statements made by a party in a land office proceeding are not an estoppel when it is not averred that they were made with the intention that they should be acted on by the party now asserting the estoppel.

No fact found by the land office is res adjudicata in a subsequent suit between the same parties where the parties appeared in the two proceedings in different capacities and the ultimate objects of the two were wholly different.

An applicant in the land office must show certain facts: If he fails and his application is dismissed it is the equivalent of a non-suit only. The finding of non-mineral discovery does not disprove discovery when alleged in court.

[2]**Discovery does not relate back. Exclusion of original location certificate.** Rev. St. U. S. § 2320, provides no location of a mining claim shall be made until discovery of the vein or lode within the limits of the claim located. Plaintiff filed his certificate of location in May, 1892, but did not make a discovery until April, 1894, at which time he relocated the premises. Before such discovery, defendant made a discovery and location on the premises. *Held*, that plaintiff's discovery would not relate back to the time of the filing of the original location, so as to cut out intervening

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[1]Writ of error from the National Supreme Court was dismissed in 188 U. S. 184, on the ground of no federal question involved.

[2]Discovery after location makes the claim good but does not cure by relation back to the date of the location. *Nevada Co.* v. *Home Co.* 20 M. R. 283.

A patent is conclusive evidence of discovery. *Calhoun Co.* v. *Ajax Co.* 182 U. S. 499; 21 M. R. —. But not against a party who had no opportunity to adverse. *Uinta Co.* v. *Creede Co.* 119 Fed. 164; 22 M. R. —.

There can be no valid location without previous discovery. *Overman Co.* v. *Corcoran*, 1 M. R. 691. *N. Noonday Co.* v. *Orient Co.* 9 M. R. 529. *Nevada Co.* v. *Miller*, 97 Fed. 681. *Ledoux* v. *Forester*, 94 Fed. 600.

rights, and hence such original certificate of location was not admissible in evidence as against defendant.

The word vein has no arbitrary meaning applicable to every case. The conditions of locality and deposit must be considered. With these considerations the definition in the court's instructions is upheld.

[3]**That a corner falls on a railroad embankment** is no excuse for failure to place it unless it would have been so close to the track as to interfere with the passage of trains.

Sweeping exception. The court will not review exceptions to instructions which gave the trial court no opportunity to correct. An exception to each and every instruction will not avail against any instruction which is in part correct.

Calling jury in two-division court. Consideration of the practice as to selecting jury where the court has two divisions and a double panel of jurors.

The fact of selecting deputies as talesmen "is not the slightest reason to impugn the integrity of the sheriff."

Misconduct of guide and separation of jury considered and held insufficient to constitute error.

On inspection of mine by jury, there being no special instruction as to examination of any particular working, it is not matter of reversal that certain of the jurors did not examine certain of the shafts. What they wish to examine is left to their discretion.

Newly discovered evidence should not induce a new trial unless it would clearly have produced a different verdict.

ON REHEARING.

A relocation upon a new discovery shaft, the old discovery showing no vein, is practically an original location.

A location without a discovery carries with it no rights.

Ore specimens on rebuttal. Specimens are used to prove mineral at the place from which taken, and as plaintiff had offered evidence of the existence of a vein at such place, the samples of minerals offered in rebuttal went only to the same point and were properly excluded.

Discovery after location complete, validates the claim where there has been no intervening assertion of title. *Golden Terra Co.* v. *Mahler*, 4 M. R. 390. *Jupiter Co.* v. *Bodie Co.* 4 M. R. 411. *Zollars* v. *Evans*, 4 M. R. 407. *Erwin* v. *Perego*, 93 Fed. 608. *Brewster* v. *Shoemaker*, 28 Colo. 176; 21 M. R. —. *Miller* v. *Chrisman*, 140 Cal. 440; 73 Pac. 1083.

Location without discovery initiates no rights against a later comer. *Olive Co.* v. *Olmstead*, 20 M. R. 700; *Miller* v. *Chrisman*, *supra*.

[3]Compare *Warnock* v. *De Witt*, 11 Utah 324; 40 Pac. 205.

[4]**The state statute requires that the discovery shaft show a well defined crevice.** A "crevice" means a mineral bearing vein. Discovery of a vein in another shaft will not supply the absence of such discovery in the discovery shaft.

The amount of annual labor proved is for the jury to determine, and the court will not disturb their verdict where, though contradictory, there was sufficient evidence to sustain it.

Failure to do the annual labor does not ipso facto work a forfeiture. The location, once valid, remains so whether the annual labor be performed or neglected until another initiates a new location. This is the forfeiture: and the burden of proving the work not done by fair preponderance of evidence is on the forfeitor or relocator.

Appeal from District Court, El Paso County.

Action by appellant, as plaintiff in the court below, as the owner of the Tecumseh lode, in support of his adverse against the application of appellees, as defendants, for patent to that portion of the Ophir lode in conflict with the Tecumseh. From a judgment in favor of defendants, plaintiff appeals. The facts and other data necessary to an understanding of the questions involved and decided will be found in the opinion, in connection with the discussion of the errors assigned by appellant.

H. B. JOHNSON and RALPH W. SMITH, for appellant.

HALL, BRYANT, LEE & BABBITT and C. S. THOMAS, for appellees.

GABBERT, J. By way of replication to the answer and counterclaim of appellees, appellant interposed (1) what

[4]Compare *Healy* v. *Rupp*, 28 Colo. 102; 21 M. R. —.

Where senior locator in alleged default as to annual labor, reentered and did the work, the second locator having failed to sink his discovery shaft to the legal depth, such second locator takes no title. *Field* v. *Tanner*, — Colo. —; 75 Pac. 916.

purported to be a plea of res judicata, and (2) a plea of estoppel in pais.

By the first it was averred, in effect: That on February 10, 1893, appellees entered the Ophir lode. That thereafter appellant and others filed a protest against such entry, by which it was alleged that no discovery of mineral thereon had been made. That a hearing on such protest was had, which resulted in a finding by the land department of the general government that no discovery had been made on the Ophir; that the discovery shaft thereon was but 25 feet in depth on the 11th day of October, 1893; that the sinking of such shaft was the only work performed by appellees on the Ophir prior to that date. And that on these findings a judgment was entered canceling the entry.

By the second plea it was averred: That the appellee J. J. Cone at the hearing above referred to testified, in substance, that the discovery shaft on the Ophir was but 25 feet deep on the 11th day of October, 1893; that no vein had been disclosed thereon at that time; and that no work had been performed on the claim in the year 1893. That, by reason of such testimony, appellant and others interested with him were induced to expend a large sum of money in exploring for mineral in the ground in conflict between the Tecumseh and Ohpir lodes, and in working and developing the former. That appellees knew that such expenditure was being made on the faith of the truth of the above statements of appellee Cone, but never contradicted such statements. That if appellees performed any work on the Ophir in the year 1893, prior to the 11th day of October of that year, sunk the shaft to a greater depth than 25 feet, or discovered a vein in such shaft, appellant and those working under him were ignorant of such facts. To each of these pleas a general demurrer was interposed and sustained. This ruling of the trial court is assigned as error.

It will be borne in mind that the application of appellees for patent to the ground in controversy, adversed by appellant, is in no manner based upon the proceedings resulting in an entry which was canceled as above pleaded; nor do they in any manner base their rights to the ground in controversy by virtue of such application, or the entry thereunder which was afterwards annulled. The claim of counsel for appellant is that the judgment of the land department is res judicata of the facts established in the proceeding instituted by appellant and others, protesting against such entry. In order to constitute a judgment in one action res judicata in another, it must appear that the quality of the parties to each is the same. *Slocum* v. *De Lizardi,* 99 Am. Dec. 740; *A. T. & S. F. R. Co.* v. *Commissioners,* 12 Kan. 127; Freem. Judgm. § 252; Bouv. Law Dict. tit. "Res Judicata"; *Benz* v. *Hines,* 3 Kan. 390; *Lower Latham D. Co.* v. *Louden Irr. C. Co.,* 60 Pac. 629.

The judgment rendered by the land department in the matter of the former entry of the land in controversy in no manner settled the rights of the parties to that proceeding to such lands. It merely held that appellees were not entitled to be vested with the fee therein from the general government. The protestants were not parties in interest, because they made no claim to the subject-matter of the controversy, and with respect to that proceeding occupied the position of amici curiæ, with the right of showing that appellees had not complied with the requirements of the law relative to obtaining title from the government for mineral lands at the time of their former application. Weeks, Min. Lands, § 96; *In re Mt. Pleasant Mine,* Copp's U. S. Min. Lands, 204.

It is manifest, therefore, that the quality or capacity in which appellant acted in the protest proceedings pleaded is entirely different from the capacity in which he appears in the present action.

In order to sufficiently plead an estoppel in pais, based upon statements, it must be averred, among other things, that the statement relied upon to constitute such estoppel was made with the intention that it should be acted upon. *Patterson* v. *Hitchcock,* 3 Colo. 533; *People* v. *Brown,* 67 Ill. 435; *Martin* v. *Zellerbach,* 38 Cal. 300.

In the replication interposed by appellant on this subject there is no averment that the statements attributed to the appellee Cone were made by him with the intention of deceiving or misleading appellant or those acting with him, nor is there any allegation that supplies the absence of a direct one to this effect. The demurrer to each plea in the replication was properly sustained.

Numerous errors are assigned on the rulings of the trial court with respect to the admissibility of evidence, some of which are new and important. On the trial appellant offered in evidence the decisions of the department of the interior rendered in the matter of the protest against the former application of appellees for patent on the Ophir lode, together with a notice, directed to them, that a hearing had been ordered upon such protest. Each of these was excluded. These decisions were rendered in the proceedings mentioned in the plea of res judicata, to which reference has already been made. The principal contention between the parties was, upon which of the conflicting lode claims was a discovery of mineral first made? The department, in the protest proceedings, found from the evidence submitted that no discovery of mineral had been made upon the Ophir on the 11th day of October, 1893. Counsel for appellant contend that these decisions were material evidence, because this finding was conclusive upon that question, and that appellees were precluded from showing a discovery on the Ophir prior to that date. A sufficient answer to this proposition should be that, as the judgment rendered in the protest proceedings

was not res judicata between the parties to this action, no fact found by the department in those proceedings would be competent to contradict or establish any fact directly in issue in this. A consideration of the nature of an application for patent to mineral lands which is rejected, and the result of the judgment of the department of the interior, which merely holds that the applicant is not entitled to patent, and where the rights of others to the lands embraced in the application are not determined, will demonstrate that no finding of fact made by the department in such case is either conclusive or admissible in evidence in another action, in which the applicant bases no rights to the ground in controversy by virtue of such proceedings. Under the law regulating the issuance of patents to mineral lands, and the rules of the department, certain facts must be established. If not, the application is dismissed. Such a judgment is, in effect, one of nonsuit, and therefore not one upon the merits. *Denver & Rio Grande R. Co.* v. *Iles,* 25 Colo. 19, 53 Pac. 222.

It is no more than a conclusion that in that particular application the applicant has failed to establish the necessary facts to entitle him to a patent, the same as a judgment of nonsuit would be directed in an action at law, where the plaintiff had failed to establish the facts upon which he relied to entitle him to the judgment demanded. The fact that a protest had been filed does not change the rule, when, as in this case, the rights of the protestants were neither involved nor adjudicated. Many authorities are cited by counsel for appellant in which it has been held that the findings of fact made by the department of the interior are conclusive upon the courts. In all these cases the question involved was the authority of the courts to redetermine questions of fact already determined by the department, where parties either based their right upon a muniment of title issued by the government, which had been annulled, or were attempting to

show that the facts upon which a patent had been issued were different from those necessarily established before the department, upon which it based its action. This is not the case at bar. Appellees are not asserting any rights to the premises in dispute by virtue of the canceled receiver's receipt, by attempting to show that the findings of the department that no discovery of mineral had been made upon the Ophir at the time of their former application were not justified, but have instituted another proceeding to procure patent, which may be likened to a new action after having suffered judgment of nonsuit, and hence the authorities cited are not in point.

Our attention has not been directed to any case where the question here involved has been directly decided, but we think the rulings of the department of the interior fully sustain our conclusion that the cancellation of a mineral entry only is not res judicata on another application for patent, and that the facts found, upon which such action is based, are not admissible to support an adverse claim against a second application for the same premises. In *Branagan* v. *Dulaney,* 2 Land Dec. Dep. Int. 744, Secretary Teller, in speaking of the rights of the locator of a mining claim, says:

"The government gives the possessor of a lode his choice to hold it without patent, or to take patent. If he attempts to take a patent, and finds that he is met with obstacles not anticipated, he may relinquish his attempt to secure patent, and continue to hold by right of possession. Thus, when the applicant to enter a lode claim is met with an adverse claim, he may, if he chooses so to do, avoid a legal conflict by dismissing his application for a patent, and rely on his title by possession given him by the local laws and customs, and a compliance therewith."

In the case of the *Clipper M. Co.,* reported in 22 Land Dec. Dep. Int. 527, it appears that certain parties applied

for a patent on a placer claim, against which a protest was filed, upon the theory that the land embraced in the application was not placer. This protest was sustained; the department finding, as a matter of fact, that the ground was not subject to location as a placer-mining claim. Afterwards lode claims were located within the limits of the placer, upon which applications for patent were made. The owners of the placer filed an adverse claim against the issuance of patent to the lode claims, in which they set up their old placer title; the applicants moved to dismiss because a judgment had already been rendered by the land department that the ground claimed as a placer could not be held as such; and the department refused to dismiss the adverse of the placer claimants, which was affirmed by the secretary of the interior. While the judgment of the latter seems to have been based largely upon the proposition that the adverse claim ousted the department of jurisdiction, the secretary, in his opinion, said:

"It is contended by counsel for applicant that the judgment in the Searl placer was a complete and final adjudication that the land embraced therein was not placer ground, and could not be entered as such; hence, the adverse claim filed by Searl et al., based, as it is, upon land for which application for patent has been rejected, ought not to be accepted by the department as a legal or proper adverse claim, and its application should be received and patent issue notwithstanding. * * * The judgment of the department in the Searl placer case went only to the extent of rejecting the application for patent. The department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it."

In the case of *McGowan* v. *Mining Co.*, 23 Land Dec. Dep. Int. 113, the secretary of the interior, in speaking of the effect of the cancellation of a mineral entry, said:

"The fact that the entry was canceled would not, of itself, render the ground subject to relocation. The original location of the lode was not affected by the cancellation, even though it had been regular, and the owner could still hold it under its possessory right, so long as there was a compliance with the requirements of the law."

The fair inference from these rulings is that the judgment of the department rejecting an application for patent, and nothing more, leaves the applicant with the same rights as though no application had ever been made.

The trial court excluded appellant's original certificate of location on the Tecumseh, which bore date May 3, 1892, was recorded May 6th of the same year, and claimed a discovery on April 18th preceding. The evidence was undisputed that no discovery of mineral in place, such as the law contemplates, was made upon the Tecumseh until April 20, 1894, at which time appellant relocated the premises and filed a certificate of location. His counsel contend that the original location certificate should have been admitted, because, a discovery having been made in the spring of 1894, it would relate back to the date of the original location. The validity of the location of a mining claim is made to depend primarily upon the discovery of a vein or lode within its limits. Section 2320, Rev. St. U. S. Until such discovery, no rights are acquired by location. The other requisites which must be observed in order to perfect and keep alive a valid location are not imperative, except as against the rights of third persons. If the necessary steps outside of discovery are not taken within the time required by law, but are complied with before the rights of third parties intervene, they relate back to the date of location, but not so with discovery; for it is upon that act that the very life of a mineral location depends, and from the time of such discovery only would the location be valid, provided, of course, that others had not previously acquired rights therein. *North Noonday M. Co.* v. *Orient*

M. Co. (C. C.) 6 Sawy. 299, 1 Fed. 522. Under this rule the original certificate of the Tecumseh was properly excluded; for the rights of appellant to the disputed premises only dated from April 20, 1894.

Other errors assigned upon the admissibility of evidence are argued, but, as they are manifestly untenable, they will not be noticed in detail.

Errors are assigned upon the instructions given by the court, and also upon certain instructions requested by counsel for appellant and refused. Those relating to the instructions given will be first considered.

The correctness of the charge of the court defining "veins" is challenged. On this subject the jury was advised, in effect, that a vein is a continuous body of mineral-bearing rock, containing precious metals in appreciable quantities, with defined boundaries in the general mass of the mountain; that theoretically it must have two walls, but that it was not absolutely necessary that they be disclosed; that their presence would be strong evidence of the existence of a vein, but that the boundaries of the vein might be ascertained by tests which would distinguish the rock or other substance carrying precious minerals from the rock inclosing it, which did not. The criticism of the foregoing is that the definition of a vein, as therein given, was not applicable to the facts, and authorized the boundaries of a vein to be established by assays alone. On behalf of appellant it is claimed there were three well-defined fissures of the Tecumseh disclosed in as many different shafts. It is conceded that on the Ophir a vein with defined boundaries was disclosed in the discovery shaft at a depth of about 34 feet. It was located prior to the Tecumseh. The important question upon which the rights of the parties hinged was, upon which claim was the first discovery made? In determining this fact it was important to ascertain whether the vein of the Ophir was first disclosed near the bottom of the discovery shaft, or at a point about 20 feet

from the surface. Witnesses for appellees had testified to the existence of the vein at this latter point, or to conditions which, if believed by the jury, from which its existence at this locality in the shaft might be inferred, although it appears that defined boundaries of the vein were not visible at this place. Many definitions of veins have been given, varying according to the facts under consideration. The term is not susceptible of an arbitrary definition, applicable to every case. It must be controlled in a measure, at least, by the conditions of locality and deposit. *Cheesman* v. *Shreeve* (C. C.) 40 Fed. 787. The distinguishing feature between a vein and the formation inclosing it may be visible. It must have boundaries, but it is not necessary that they be seen. Their existence may be determined by assay and analysis. Id.; *Hyman* v. *Wheeler,* (C. C.) 29 Fed. 347; *Iron S. M. Co.* v. *Cheesman,* 116 U. S. 529, 6 Sup. Ct. 481, 29 L. Ed. 712. The controlling characteristic of a vein is a continuous body of mineral-bearing rock in place, in the general mass of the surrounding formation. If it possess these requisites, and carry mineral in appreciable quantities, it is a mineral-bearing vein, within the meaning of the law, even though its boundaries may not have been ascertained. The instructions of the trial court recognized the different conditions which should be considered in establishing the existence of a vein, applicable alike to the veins claimed to be disclosed upon the respective mining claims. On the property of appellant, it was asserted that the walls of the vein were visible. On that of appellees, the vein was claimed to have been discovered about 20 feet from the surface, although at that point neither wall was disclosed. So that, taking into consideration the conditions which the respective parties asserted, and upon which they relied to establish the existence of a vein upon the respective properties, the charge of the court on this subject was correct.

Appellant contends that certain instructions requested

upon his behalf, which were to the effect that the discovery shaft upon a mining claim must show a well-defined crevice, should have been given. This contention is based upon the proposition that the vein of the discovery shaft must be plainly visible. From what we have already said regarding the definition of veins, and how their existence may be determined, it is clear that the instructions requested, which sought to inject into the case the theory that a vein could not be said to be discovered unless its boundaries were disclosed, were properly refused.

The southwest corner post of the Tecumseh was not placed where it fell by right, because it was claimed that point was impracticable. The evidence establishes that this corner fell upon a railroad embankment. It is claimed by counsel for appellant that the court instructed the jury to the effect that unless it was found from the evidence that the true southwest corner of the Tecumseh fell upon precipitous ground, and within the rails of the railroad occupying such embankment, or so near to one or the other of them that the erection of a post at that point would be interfered with by the passage of trains, it was the duty of appellant to set his post at the true corner.

The instruction referred to is not happily worded, but it must be read as a whole, and also in connection with the one immediately following, from which it is apparent that the court directed the jury that appellant was required to place the southwest corner post of the Tecumseh lode at its true point, unless the evidence established that such point fell where it was impracticable to maintain it. Aside from these considerations, appellant is not in a position to complain of this instruction. It does not appear that the erection of a stake at the true corner would have been interfered with by the passage of trains. The most that can be said is that the true corner fell upon a railroad embankment 12 or 15 feet in height. The statute provides that when one or more of

the posts which must be erected for the purpose of marking the surface boundaries of a mining claim "fall by right upon precipitous ground, where the proper placing of it is impracticable, or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked, to designate the proper place." Section 3153, 2 Mills' Ann. St. These provisions concerning the placing of witness stakes cannot be invoked when the setting of a stake at the true corner is merely difficult or inconvenient. *Crœsus M. M. & S. Co.* v. *Colorado L. & M. Co.* (C. C.) 19 Fed. 78; *Taylor* v. *Parenteau,* 23 Colo. 368, 48 Pac. 505.

It certainly was not dangerous to life or limb to set this post at its true point upon a railroad embankment, and it does not appear that to have done so was impracticable; so that, if the instruction was susceptible of the construction claimed, it was correct, in that the post should have been erected at its true point, unless that point was in such proximity to the rails that it would be interfered with by the passage of trains. In this connection, we notice another point, although we do not wish to be understood as definitely deciding it. The statute above quoted provides that, where the conditions exist which authorize the placing of a boundary post at a place other than where by right it belongs, it shall be "suitably marked to designate the proper place." This requirement is for the purpose of designating where the true point or corner is, which is evidenced by such post, and that it shall be so marked as to impart this information. In this case it appears that the only marks upon the southwest corner post of the Tecumseh were "W. C. 4—9005." These marks certainly did not indicate, by either course or distance, where the true southwest corner of the claim would be found.

At the conclusion of the introduction of the evidence the jury was directed to visit the premises in dispute. Objection is made to the instruction of the court to the jury on this subject, in that it was to the effect that the object of this view

was to enable a better understanding and comprehension of the testimony of the witnesses respecting the issues involved, but that the verdict must be based upon the evidence introduced before the court. The contention of counsel for appellant is that the information gained by the jury in visiting the premises should have been treated by that body as substantive evidence. It is well settled by numerous decisions of this court that, although instructions need not be preserved by a bill of exceptions, yet, unless in an appropriate way an exception to an instruction is made in the court below, so that its attention is directed to the error of law complained of, this court will not review instructions which the trial court was given no opportunity to correct. *Keith* v. *Wells,* 14 Colo. 321, 23 Pac. 991; *Edwards* v. *Smith,* 16 Colo. 529, 27 Pac. 809; *Supreme Lodge, K. of H.,* v. *Davis* 26 Colo. 252; 58 Pac. 595; *D. & R. G. R. Co.* v. *Ryan,* 17 Colo. 98, 28 Pac. 79.

At the conclusion of the instructions given by the court of its own motion, which embraced the one under consideration, an exception in this form was preserved: "To the giving of which instructions, and to each and every thereof, the plaintiff, by his counsel, then and there duly excepted." This is equivalent to saving an exception to each instruction separately, but it cannot avail as against any instruction to which it is directed which contains a correct statement of the law, because it is insufficient to point out that which is incorrect from that which is correct.

Without attempting to state fully the instruction which contains the direction of which appellant complains, it is sufficient to say that it embraces other distinct statements of law, which are manifestly correct. Therefore the exception noted was wholly insufficient to present the question for review which it is now sought to have us pass upon and determine.

Other objections are urged to the instructions given, which, from the views expressed, we are of the opinion are

not well taken, and we do not deem it necessary to notice them at length. Some of the instructions requested by appellant and refused, it is apparent from what we have already said, were not correct statements of the law; and, as to the remainder, they were embodied in those given.

The remaining questions presented by counsel for appellant were raised upon a motion for a new trial, and may be considered under the following heads: Irregularity in summoning talesmen; misconduct of officers in summoning these talesmen; misconduct of guide selected by appellees; misconduct of jury; failure of jury to properly view premises in dispute; insufficiency of evidence to support verdict; newly-discovered evidence.

The district court of El Paso county is conducted under two divisions in one of which civil causes are tried; and in the other, criminal. It is the custom to assign certain jurors of the regular panel to each division. When this cause was called for trial, appellees demanded a jury of 12. The number of jurors in attendance on the division in which the case was pending not being sufficient from which to select that number, the court, instead of calling jurors from the criminal division, directed a certain number to be summoned by open venire. From the persons thus summoned, and those of the regular panel in attendance on the division in which this cause was tried, the jury was selected. After verdict, objection to the action of the court in summoning talesmen was made for the first time, when it was sought to show that the jurors in attendance on the criminal division were not employed or needed when the jury in this case was impaneled. Appellant is not in a position to raise any question regarding the action of the court in directing the issuance of an open venire. The exercise of reasonable diligence upon his part would have disclosed the apportionment of the jurors between the two divisions of the court, and if the conditions were such that he could have properly insisted on having jurors called

from the division engaged in the trial of criminal causes, who were then not actually upon any jury, before talesmen could be placed in the box, it was his duty to call the attention of the court to this fact. Having failed to do so, any error in this respect is waived. It is not necessary, however, to place the decision of this question upon this ground alone. The apportionment of the regular panel between the two divisions of the court was entirely in the control of the judges. Their action in this respect cannot be interfered with. They make the apportionment in view of the expected need of jurors in the different divisions. If it turns out that they were mistaken in their action, it will not be inquired into for the purpose of ascertaining whether a proper apportionment was made or not. It was evident that a jury of 12 could not be selected from the regular panel attending the division in which this cause was tried. The judge directed an open venire for a sufficient number for this purpose. This, in the exercise of his discretion as to how and when talesmen may be summoned, he had the clear right to do. Section 2609, 3 Mills' Ann. St.; Sess. Laws 1891, p. 250, § 4.

It is claimed that the sheriff packed the jury in this case in the interest of appellees. This charge is based substantially upon these facts: It appears that the sheriff, or his office, received notice that a special venire for jurors would be issued. From what source this information was obtained is not disclosed. That persons, part of whom held commissions as deputies, were requested by the sheriff, or his official employés, to be at the sheriff's office on the morning the venire issued, but prior to its issuance, who were afterwards summoned as talesmen and called into the jury box. One of these deputies, not selected as a juror, was afterwards detailed as the bailiff specially in charge of the jury in this case. There is not a word of evidence that the sheriff, or any one connected with his office, or that either of the persons summoned as talesmen, was biased against the appellant, or

took any steps, directly or indirectly, to influence the jury selected to try this cause. In our opinion, there is not the slightest reason to impugn the integrity of the sheriff, or those acting under him, in this matter.

While the jury was engaged in viewing the disputed premises, the guide selected by the appellees pointed out to the jurors the place where, he claimed, the southwest corner stake of the Tecumseh would fall, by right. It seems that he had previously made a survey of the premises. This action on the part of the guide was wrong, and directly contrary to the instructions of the court; but the attention of the court was called to this matter previous to argument, whereupon the jury was directed to disregard what was said by the guide regarding the proper place for this stake, and told that upon this point nothing could be considered except the evidence introduced in the court room and upon the trial. This declaration of the trial judge was right, clear, and emphatic; and we cannot assume that men who had taken a solemn oath to obey the instructions of the court would disregard this plain, authoritative statement regarding their duty.

The misconduct of the jury is based upon the fact that one of the jurors, after the cause was submitted, was separated from his fellows. An affidavit of this juror and the bailiff fully explains the reason of one separation, but it is insisted that this is not the one established by affidavits filed in support of this ground of the motion for a new trial. According to one of these affidavits, the juror was in a room by himself, and during that period some unknown person was standing in the door of this room, who, upon seeing the affiant, turned and walked away. Much stress is laid upon the fact that during these separations the juror was seen alone in company with the bailiff, who had originally been summoned as a talesman. The mere separation of a jury after the submission of a cause is not per se sufficient for setting aside the verdict and granting a new trial. It must appear that by

reason of such separation there is a strong probability that the jury has been tampered with, or improperly influenced to return the verdict which is sought to be set aside. *Dozenback* v. *Raymer*, 13 Colo. 451, 22 Pac. 787.

There is nothing in the facts established by the affidavits to show that the jury or any member had been tampered with, or that any effort was made in this direction. Citizens who are required to render services in the determination of disputes between litigants should not be charged with a disregard of their duty or their oaths, nor will the courts assume that they have been guilty of such conduct, unless the facts upon which such a charge is based warrant that conclusion.

The facts upon which counsel for appellant rely in support of the claim that the jurors did not properly view the premises are to the effect that all of the jurors did not go down the Tecumseh discovery shaft, that one of the bailiffs stated to the jurors that those who did not care to go down the shafts of either the Ophir or Tecumseh need not do so, that two of the jurors did not view or examine either shaft, and that only one went down the shaft of the Ophir. In suits involving the title to the right of possession of a mining claim, it is made the duty of the court, upon the application of either party, to send the jury in a body to view and inspect the premises in dispute. Each party may select a guide, to be approved by the court, who shall be authorized to point out such features as it is desirable that the jury should see. Section 188a, Mills' Ann. Code. In the case at bar the jurors were not directed to examine any particular portion or feature of either claim. According to the directions of the court on this subject, that was left to their discretion. We are not prepared to say that a litigant in a mining suit may not have the right to have the jury specially directed regarding the examination, but no such request was made by appellant in this case; and, therefore, while it may have been proper that the jurors should each have examined the shafts

upon the respective properties, the appellant, having failed to request the court to so direct, is not in a position to complain because the jury, in the exercise of its discretion, only examined such features as, in its judgment, after having heard the testimony, were desirable for the purpose of aiding a better understanding and application of the evidence.

It is also urged that the evidence is insufficient to support the verdict, because as to some of the issues there was no evidence to sustain them, and as to others it was false and fabricated. We shall not attempt to give an abstract of the evidence upon which the jury determined the questions of fact involved in this case. It is sufficient to say that there is evidence tending to prove every material issue tendered by the appellees. Whether some or all of this evidence was false was a matter purely within the province of the jury. The witnesses were present in court. Their alleged inconsistent statements was a matter for the jury to consider in passing upon their credibility. In this condition of the record, we cannot disturb the findings of the jury.

The newly-discovered evidence upon which appellant bases his right to a new trial was evidence (so it is claimed) which would have impeached the credibility of one of the important witnesses of the appellees. It does not appear that if this witness had been impeached it would have changed the result. There were other witnesses testifying to the same matters that he did. Newly-discovered evidence which only goes to impeach the credit or character of a witness is not sufficient ground for a new trial, except it is clear that such impeachment would have resulted in a different verdict. *Christ* v. *People,* 3 Colo. 394.

The judgment of the district court is affirmed. *Affirmed.*

ON PETITION FOR REHEARING.

PER CURIAM. The conclusion announced, that the plea of res judicata interposed by appellant was insufficient, and

that the judgment pronounced by the land department in the protest proceedings therein referred to was not competent evidence, in no manner conflicts with the decision in *German Ins. Co.* v. *Hayden,* 21 Colo. 127, 40 Pac. 543. In that case the right of the appellees to recover depended upon the fact that the insured was vested with the title in fee to the land upon which improvements destroyed by fire were situate. At the time the contract of insurance was entered into, the assured had obtained a receiver's receipt for these premises. Subsequently, and prior to the loss, this receipt was canceled, and it was held that this action of the department was conclusive; that the character of title which the insured exacted should be vested in the insured did not exist. In the case at bar, the appellees, when their entry was canceled, fell back upon the possessory rights initiated by the steps which they alleged had been taken in locating the premises in dispute. This they had a clear right to do, and therefore in establishing the facts regarding these steps they were not impeaching the judgment canceling the receiver's receipt. Another important element necessary to constitute an estoppel in pais is that the party to whom the statement was made which it is sought to make the basis of an estoppel was ignorant of the truth of the facts to which such statement relates. *Patterson* v. *Hitchcock, supra.*

It does not appear from the plea interposed as an estoppel in pais that appellant was ignorant on the subject of the existence or nonexistence of a vein in the Ophir shaft. The plea in question contains no direct averment upon this point, or any from which the inference could be fairly and reasonably deduced that appellant had no knowledge as to what was or was not disclosed in the Ophir shaft, in the way of a vein. For this reason, it does not appear that he has been misled by the statements attributed to appellee Cone. For the same reason, it does not appear that the silence of Cone misled him to his injury.

For a better understanding of the reasons why the ruling of the trial court in excluding appellant's original certificate of location on the Tecumseh was correct, the following facts should be borne in mind: The location of the Tecumseh under the discovery alleged to have been made April 20, 1894, was upon a discovery at an entirely different point from the discovery shaft upon which the original location was based. Under the new location a new discovery shaft was adopted. It became, in effect, an original location. The statute which permits amendatory or additional certificates to be filed provides that the filing of such a certificate shall not preclude the claimant under it from proving such title as he may have held under the original location certificate. Section 3160, Mills' Ann. St. For this reason the original certificate may, under certain conditions, be admissible. Such conditions, however, do not exist in the case at bar. Prior to the discovery alleged to have been made upon which the second location is based, no right to the premises in dispute was vested in appellant which entitled him to hold the ground as against third parties, because no discovery of mineral had been made before that time. A location without a discovery carries with it no rights. *Upton* v. *Larkin* (Mont.) 6 Pac. 66. The acts to establish a location which appellant had performed prior to the discovery in April, 1894, would have taken effect, in so far as they could have been utilized, as of the date of such discovery. *Erwin* v. *Perego,* 35 C. C. A. 482, 93 Fed. 608. Appellant, however, did not rely upon any of these acts, but filed a new location certificate, including ground the boundaries of which were different from that described in the original certificate. This was a new location under a new and distinct discovery, and the act of filing a new certificate under this state of facts was a complete abandonment of all rights which might have attached to the steps taken under the original location. The appellees at all times relied upon a discovery claimed to have

been made in the discovery shaft of the Ophir. Even if there was no mineral disclosed in this shaft at the time they filed their location certificate, the subsequent discovery which they claimed to have made in this shaft made this location valid, except as against intervening rights, from that date. *Erwin* v. *Perego, supra.* They never filed any other certificate, and the original certificate of the Ophir was therefore properly admitted.

On the trial below, appellees offered in evidence samples of rock purporting to come from the discovery shaft of the Tecumseh, which they claimed did not contain mineral. In rebuttal, appellant produced a sample claimed to have been taken from a crevice in this shaft. This evidence was excluded on the ground that it was not rebuttal. "Rebutting evidence is defined to be that which is given to explain, repel, counteract, or disprove facts given in evidence by the adverse party. It is a general rule that anything may be given as rebutting evidence which is a direct reply to that produced on the other side." 19 Am. & Eng. Enc. Law, 1093. Appellant had offered evidence in chief tending to prove the existence of mineral in the discovery shaft of the Tecumseh. To meet this evidence, appellees had introduced samples from this shaft. As against this evidence, the offer of appellant was not rebuttal. It was nothing more or less than evidence which would have tended to prove the existence of a vein in the Tecumseh shaft, and would properly have been admissible in chief, but was in no sense rebuttal; for it did not tend to prove that the samples received in evidence on behalf of appellees were in fact mineral bearing, or did not come from the Tecumseh.

In instructing the jury on the subject of marking the surface boundaries of a lode claim, the court, in instruction No. 17, inter alia, stated: "Where, in marking the surface boundaries of a claim, any one or more of such posts shall fall by right upon precipitous ground, where the proper

placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked to designate the proper place."

Immediately following this instruction, and upon this subject, the court further stated:

"(18) Upon that point the court instructs you that unless you find from the evidence that the southwest corner of the Tecumseh claim fell upon precipitous ground, and within the lines of the rails of the Florence & Cripple Creek Railroad, or so near to one or the other of them that the erection thereof would be interfered with by the passage of trains, and was for that reason impracticable, then you are instructed that it was the duty of the plaintiff to set his post at such corner. If, upon the other hand, you should believe that the proper place of such stake was within the lines of the rails of said road, then you are instructed that, under the statute, such witness corner shall be set at the nearest practicable point. Whether this was done, you are to determine from the evidence in the case; and unless you should believe, in that event, that the said witness corner was set substantially at the nearest practicable point, the marking of said claim would be invalid.

"(19) In this connection the court instructs you that if you believe from the evidence that the southwest corner of the Tecumseh lode fell by right on the roadbed of the Florence & Cripple Creek Railroad, and that such point was precipitous ground, where the proper placing of such corner was impracticable, and that plaintiff placed such corner stone at the nearest practicable point, suitably marked to designate the proper place, then such corner was sufficient and valid."

It will be observed that these instructions follow each other, that 18 refers to the part of 17 above quoted, and that in 19 what is there stated on the subject is preceded by the statement "in this connection"; so that, while the instruc-

tions are numbered, they are so intimately connected, and refer one to the other, that the jury must have understood that they were to be read as a whole. When so read, the thought expressed by the trial court is to the effect that appellant was not excused from placing the southwest corner post of the Tecumseh lode at its true point unless it appeared from the evidence that such point fell where it was impracticable to maintain it.

Counsel for appellant contend that, under instructions given and refused, the jury was precluded from considering the admitted fact that veins were exposed in two different shafts upon the Tecumseh, designated 2 and 3. What we said in the original, main opinion on this subject is withdrawn. In considering this question, these facts must be borne in mind: Whether or not a mineral-bearing vein was disclosed in the discovery shaft upon which the present location of the Tecumseh is based was controverted. No location was made upon either of the discoveries in shafts 2 and 3. The proposition of counsel for appellant is that if a well-defined crevice, although not bearing mineral in appreciable quantities, is exposed in the discovery shaft, the claimant may rely upon discoveries in other shafts within the boundaries of his claim which disclose the mineral necessary to constitute technical veins.

No question is raised regarding the validity of our statute relative to the location of mining claims. In order that there may be no mistake as to the position of counsel on this subject, we quote from their original brief, as follows:

"* * * If the discovery shaft contains a well-defined crevice, thus giving all the appearance of a discovery, the claimant may rely upon other shafts within the boundaries of the claim for his discovery of the mineral necessary to constitute technical veins. The state statute does not provide what the well-defined crevice shall contain, while the act of congress makes no provision as to what shaft the vein re-

quired shall be in. Reading and applying the two statutes together, we submit that the well-defined crevice must be in the discovery shaft, and the mineral-bearing vein may be found in some other shaft upon the claim,"—and also from their reply brief, in support of their petition for a rehearing, the following: "We come now to the question as to whether the entire right to a claim, in so far as the same depends upon a discovery of a well-defined crevice, (as required by the state statute), and the discovery of a vein, (as required by the act of congress), is *wholly dependent* upon the discovery shaft. * * *

"We have not questioned the validity of our state statute. It is not necessarily, when properly construed, in conflict with the act of congress. Both the state statute and the act of congress can be given effect, and they should be so construed as to accomplish this. * * *

"We have not maintained that a discovery shaft can be altogether dispensed with. Neither have we maintained that, when the state statute in regard to such crevice has not been literally complied with, we can go outside of the discovery shaft for the technical lode or vein, the discovery of which, within the limits of the claim, is required by the act of congress."

The statute of this state which designates what shall be disclosed in the discovery shaft provides that it shall disclose a well-defined crevice at the depth of at least 10 feet from the lowest part of the rim of such shaft, at the surface. Section 3152, 2 Mills' Ann. St. It being conceded that the laws of this state relative to the requirements of a discovery shaft are valid, it appears to us that the proposition upon which counsel rely is not tenable. If, as stated, the state statute is legal, it necessarily follows that the discovery shaft must expose the vein upon which the location is based, or at least disclose one, and therefore the mere discovery of some other vein within the limits of the claim cannot supply the

absence of the one required to be exposed in the discovery shaft. In other words, the proposition of counsel for appellant cannot be upheld unless the state statute is declared invalid, and the admission upon their part that it is not, relieves us from the necessity of determining the effect of discoveries in shafts 2 and 3 of the Tecumseh.

"Crevice," as employed in the statute relative to a discovery shaft, clearly means a mineral-bearing vein. It was so held by this court in *Bryan* v. *McCaig,* 10 Colo. 309, 15 Pac. 413. The circuit court of the United States for the district of Colorado has adopted the same view. *Van Zandt* v. *Mining Co.* (C. C.) 8 Fed. 725; *Terrible M. Co.* v. *Argentine M. Co.* (C. C.) 89 Fed. 583.; *Cheesman* v. *Shreeve* (C. C.) 40 Fed. 787.

Under these decisions, coupled with the admitted legality of the state statute, the fact that discoveries were made in shafts 2 and 3 upon which no locations were made does not in any manner affect the validity of the Tecumseh.

It is asserted that the evidence is insufficient to establish the fact that the assessment for the year 1897 was performed on the Ophir. A witness on the part of appellees testified that he had extended a drift on the Ophir, on account of the assessment work for 1897, a distance of seven or eight feet; that this drift was worth $12 per foot. For this labor appellees appear to have paid the sum of $90. For additional work they paid for two days' work at the rate of $4 per day, and later, for further work, $18. This, in addition to paying for the powder, fuse, steel, and candles that were used in working the assessment. There may have been some evidence to the effect that the work was not worth the amount paid, but this was a question for the jury to determine; and as it has been determined in favor of appellees, upon evidence sufficient to sustain it, the finding on this subject will not be disturbed.

On the subject of annual labor, the court, by instruction

No. 24, directed the jury as follows: "Upon this point the court further instructs you that the law does not presume a forfeiture by the failure to perform annual labor, and, the plaintiff claiming that the Ophir lode became forfeited for such reason, the burden of proving that the annual labor was not done thereon is on the plaintiff; and unless he has shown you, by a fair preponderance of the evidence, that the work was not done, you are to determine that question in favor of the defendants."

The objection urged to this instruction is that it cast a burden upon the appellant which he was not required to assume. The evidence tended to establish that a valid location of the premises in dispute had been made by appellees. This location was prior to the only one under which appellant can base any claim. The act of congress (section 2324, Rev. St.) provides that a failure to perform the necessary annual work shall render a claim open to relocation, provided the original locators have not resumed work upon the claim after failure and before relocation. The fair construction of this provision is that, as between the locator and the general government, the failure to do the annual assessment work does not result in a forfeiture. In other words, it is not necessary to perform the annual labor, except to protect the rights of the locator against parties seeking to initiate title to the same premises. As against such subsequent location, a prima facie case is made on the part of the original locator by showing a valid location. *Hammer* v. *Garfield M. Co.,* 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964.

To otherwise express our views, it might be said that after a valid location the title thus acquired remains so, whether the annual assessment work is performed or not, until forfeited or abandoned. *Renshaw* v. *Switzer,* 6 Mont. 464, 13 Pac. 127, 15 Morr. Min. R. 345.

It is the location by the new claimant, and not the mere lapse of time, which determines the right of the original

locator. *Little Gunnell M. Co.* v. *Kimber,* 1 Morr. Min. R. 536.

So that a party seeking to initiate a claim to mining premises already legally located must prove that the annual labor thereon has not been performed, in order to establish that the ground so located is subject to location. In so far, then, as the rights of appellant depended upon the failure of appellees to perform the assessment work for 1897, it was incumbent upon him to establish this fact by a fair preponderance of the evidence, or, as the court stated, the burden of proof was upon him to show that the work for 1897 was not in fact performed. *Hall* v. *Kearny,* 18 Colo. 505, 33 Pac. 373; *Johnson* v. *Young,* 18 Colo. 625, 34 Pac. 173; *Hammer* v. *Garfield M. Co., supra.*

The petition for rehearing is denied.

Petition denied.

JOSEPH S. UPDEGRAFF ET AL. v. SAMUEL LESEM.

(15 Colorado App. 297; 62 Pac. 342. Court of Appeals. June 11, 1900.)

Fixtures not realty. Venue. Fixtures are not real estate and the law concerning the venue of actions as to real estate does not control actions for conversion of fixtures.

Complaint need not set out lease. In an action for the conversion of personalty, a complaint averring a lease of certain mining premises, on which plaintiff placed certain improvements, and of which defendant had wrongfully taken possession, is not demurrable for failure to allege the execution of the lease or to set forth a copy of it.

Lessor not joining in trespass. Where there is more than one lessor and more than one lessee, but a single lessee is sole owner of the fixtures and a single lessor converts them, the party not owning the property and the party not joining in the trespass are not necessary parties.

[1]**A lessee by forfeiture does not lose the right to fixtures,** nor does the rule attach that he must remove them during the term, for the term is not closed by his own act.

[2]**Nine months may not be an unreasonable time** to remove fixtures.

A notice of forfeiture by one of several co-lessors, who does not act for the others, is effectual only as to his individual interest in the lease.

On the issue as to whether a forfeiture of the lease had been declared evidence as to the manner in which the mine was worked, although improper work was cause of forfeiture, is wholly immaterial to the issue as framed.

The admission of evidence in rebuttal which ought to have been given in chief is harmless, where the new proof added nothing to the case as it had been made.

Interest as damages. In an action for conversion of personalty, the court may allow as damages for the detention a sum equivalent to the legal interest on its value from the date of the conversion.

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[1] *Mickle* v. *Douglas*, 17 M. R. 137.

[2] Fixtures left an unreasonable time become the property of the landlord. *Shellar* v. *Shivers*, 18 M. R. 260. *Mass. Nat. Bank* v. *Shinn*, 46 N. Y. Sup. 329.

Where the lease provides that the fixtures revert to lessor the creditor of the lessee cannot attach. *Little V. Co.* v. *Lambert*, 15 Colo. App. 445; 62 Pac. 966.

Appeal from the District Court of Arapahoe County.

J. E. HAVENS and J. McD. LIVESAY, for appellants.

WELLS, TAYLOR & TAYLOR, for appellee.

THOMSON, J. Samuel Lesem brought this action against Joseph S. Updegraff, Curtis P. Updegraff, Nelson Halleck and William R. Havens, to recover damages for the wrongful taking by the defendants and their conversion to their own use, of certain articles of personal property belonging to the plaintiff. The complaint alleged that on the 1st day of October, 1889, the plaintiff and one Byron J. Smith took from the defendants and Elizabeth Updegraff a written lease of certain mining premises for the term of three years from that date, with the privilege of purchasing the same at any time during the term, or while the lease should remain in force and unforfeited, for the sum of $30,000. The substance of the lease is set forth in the complaint. It provided that the lessees should immediately commence work upon the premises; continue it with reasonable diligence, and in a thorough and workmanlike manner; keep accurate accounts;

But a mechanic's lien lies in such case upon removable fixtures and cuts out the reversion. *Montana Co.* v. *Obelisk Co.* 15 Mont. 20; 37 Pac. 897.

Lessee may remove fixtures which he bought of his lessor at the time of the letting. *Pendill* v. *Maas*, 97 Mich. 215; 56 N. W. 597.

Machinery placed by licensees is not realty and mechanics' lien does not attach. *Springfield Co.* v. *Cole*, 130 Mo. 480; 31 S. W. 922.

Where lessees covenant to build a tramway nothing being said as to its ownership: *Held*, that it was parcel of the realty and went to the owner of the same. *Bedford Co.* v. *Oman* (Ky.); 73 S. W. 1038.

A lessee entered on the land to drill for oil with notice of an outstanding prior lease. The prior lease was held valid after litigation. The success of such lessee gave him no right to the fixtures placed by the second claimant. *Linden Co.* v. *Jennings*, 207 Pa. 524; 56 Atl. 1074.

render monthly statements to the lessors, showing the amount and yield of the ore taken from the premises; and pay monthly to the lessors the rents or royalties reserved in the lease. The contract also provided that in case of failure by the lessees to comply with any of their agreements, it should be lawful for the lessors to declare the lease void, and to enter upon, and take possession of, the premises. The complaint further alleged that in accordance with the terms of the lease, the plaintiff and Smith entered upon the property, and worked it diligently and in the manner required, for a certain period of time, at the expiration of which Smith "dropped out" of the lease, and the plaintiff continued the work at his own expense; that when the plaintiff and Smith took possession of the premises, they were without improvements, and that the plaintiff, at his own cost, erected a shaft house upon them, and, for their proper working, supplied them with an engine, boiler, hoister, rope, belts and buckets, and the tools and appliances requisite for the operation of the machinery, and the working of the mine; that the shaft house was built, and the engine placed, upon a stone foundation, and the boiler rested upon brick, and was incased in brick and mortar; that in April, 1891, the plaintiff was notified by the defendant, J. S. Updegraff, that the lease was forfeited, and that he would not be permitted upon the premises; and that on the 20th day of March, 1892, the defendants wrongfully took possession of the several articles which the plaintiff had placed upon the property, and unlawfully converted the same to their own use. He laid his damages at $3,000. The suit was commenced in the district court of Arapahoe county.

The defendants moved for a change of venue, and also demurred to the complaint. The ground of the motion was that the action was brought for the determination of a form of right or interest in real property, which property was situate in Clear Creek county; and that, hence, Clear Creek county was the proper county for the trial of the cause. The motion

was accompanied by the affidavit of the defendant Updegraff, showing that the shaft house, engine, boiler and hoister, and other appliances, were made fast and attached to the land, and were not portable. The grounds of demurrer were, first, that the complaint did not state a cause of action, in that, being based upon a written lease, it did not allege that the lease was executed by either the plaintiff or the defendants, nor set forth a copy of the lease; and in that it did not allege that the lease contained any provision allowing the lessees to remove improvements placed by them on the leased premises; and, second, that it appeared that there was a defect of parties plaintiff and defendant, because the complaint did not allege any assignment by Smith to the plaintiff of his interest in the lease, and, without such assignment, Smith was a necessary party plaintiff; and because the complaint did not allege any assignment by Elizabeth Updegraff of her interest in the lease to the defendants or any one else, and, hence, she was a necessary party defendant. The motion was denied and the demurrer overruled.

The theory of the motion for a change of venue was that the suit was brought for the determination of some kind of interest in real estate, and, hence, should be tried in the county in which the real estate was situate. If this were such an action as the motion supposes, unquestionably it should be tried in Clear Creek county, and the change prayed for should have been ordered. Civil Code, secs. 25, 29. But the theory was wrong. No interest in real estate was involved. No question affecting title to real estate, or right to possession of real estate, or ownership of any interest, legal or equitable, in real estate, could be tried under the allegations of the complaint. That pleading was framed upon the hypothesis that the articles, the conversion of which was charged, were not part of the real estate, but were personal property; and if it should be determined that they were not personal property, but had been incorporated into the real

estate, there could be no recovery by the plaintiff. The complaint fixed the character of the suit; and it charged the wrongful conversion by the defendants of personal property belonging to the plaintiff. Such an action is to be tried in the county in which the defendants, or any of them, may reside when it is commenced. Civil Code, sec. 27. It appears from the affidavit of Updegraff, that one of the defendants, William R. Havens, was, when the suit was brought, a resident of Arapahoe county. The cause was therefore triable in that county, and the motion for a change of venue was properly denied.

The demurrer assumed that the contract of lease was the foundation of the suit; and the deduction was that an allegation of its due execution, or something equivalent to an allegation of its due execution, was necessary; and that Smith, being one of the lessees, and Elizabeth Updegraff, one of the lessors, the former was a necessary party plaintiff, and the latter a necessary party defendant. We are not prepared to say that the statement that the plaintiff and Smith took a written lease from the defendants and Elizabeth Updegraff, would be an insufficient allegation of the execution of the instrument, even if the purpose of the suit had been the enforcement of its provisions, or the recovery of damages for their violation; but we are prepared to say that for the purposes of this suit, it was amply sufficient. The action was not based upon the lease. No complaint was made of the violation by the defendants of any of its covenants. The statements concerning it amounted only to matter of inducement. They showed how it was that property of the plaintiff happened to be upon land of the defendants. But the gravamen of the action was the conversion of the property. The question to be tried related to its ownership by the plaintiff, and its wrongful taking by the defendants. The statements concerning the lease might have been omitted, without injury to the complaint. Allegations of ownership by the plaintiff, and of

conversion by the defendants, would have been enough; and the facts of the lease, and the proceedings under it, would have been admissible in evidence as explanatory of the claims of the parties. But the lease having been set forth, and the purchase and placing of the machinery alleged, a statement that the lease authorized the removal of the machinery by the plaintiff, was unnecessary. As we shall see hereafter, *prima facie,* the plaintiff, as a tenant, had the legal right to remove the machinery without special permission; and whether facts existed which would defeat the right, was a question to be determined upon the evidence. According to the allegations of the complaint, Byron J. Smith was not a proper party plaintiff, and Elizabeth Updegraff was not a proper party defendant. Smith had no interest in the machinery. It was the sole property of the plaintiff, and he alone could sue for its conversion. Elizabeth Updegraff did not participate in the wrong, and therefore incurred no liability to the plaintiff. There would have been a misjoinder of parties, if the former had been a plaintiff, or the latter a defendant. There was no error in the disposition made by the court of the demurrer.

The answer averred that the plaintiff and his colessee failed of compliance with the terms of the lease in respect to their manner of working the mine, the rendering of statements showing the amount of ore taken from the premises, and the payment of rental or royalty; that about the 15th day of August, 1890, they refused to work the property, and abandoned it together with all improvements upon it; that by reason of the failure of the lessees to comply with the terms of the lease, the defendants declared the lease forfeited, and entered upon and took possession of the premises; and that by reason of the manner in which the shaft house, machinery, appliances and connections, were annexed to the land, and by reason of the failure of the lessees to comply with the terms of the lease, the shaft house, machinery, appli-

ances and connections became part of the realty, and as such became the property of the defendants.

The case was tried without a jury, and after hearing the evidence, the court found that the machinery, tools and appliances, were trade fixtures; that they were placed upon the property with no intention to permanently affix them to the land; that they could be removed without injury to the freehold; that the machinery and other articles belonged to the plaintiff; that he was entitled to remove them within a reasonable time after the forfeiture of the lease; and that he attempted to remove them within a reasonable time, but was prevented from doing so by the defendants. The judgment followed the findings and was for the plaintiff. There is no dispute concerning the execution of the lease, and the occupation of the property under it by the plaintiff and his cotenant. The evidence was that the machinery and other articles in question, were placed upon the property, and were purchased by the plaintiff with his own money. The testimony for the defendants was that the boiler and engine rested upon foundations of solid masonry to which they were attached by bolts, and secured by nuts screwed upon the bolts. It was testified on behalf of the plaintiff that they could be taken off the foundations simply by unscrewing the nuts, and without injury to the property. As to how long the lessees worked the mine there was a conflict in the testimony. It was in evidence for the plaintiff that the property was worked directly by him until sometime in December, 1889, or January, 1890; that afterwards it was worked under sub-leases given by him, and that work on the property ceased sometime in the early part of 1891. The last statement required by the lease, was furnished by the plaintiff to the defendants on the 31st day of March, 1891. It showed sales of ore of the net value of $1,063.02. On the same day the plaintiff paid the royalty due on that sum. The ore had been taken out sometime previously. There was testimony for

the defendant that the waste rock broken by the plaintiff in the mine, was thrown into certain drifts instead of being put on stulls or being hoisted to the surface; and that this was improper work, and, therefore, a violation of the terms of the lease. No other violation was shown. On the 18th day of April, 1891, the defendant Updegraff caused to be served upon the plaintiff the following notice:

"Central City, Colorado, April 3, 1891.

"To Samuel Lesem and to Byron J. Smith:

"You and each of you are hereby notified that the lease and option to purchase you hold on the Veto lode mine, situate in Idaho mining district, Clear Creek county, Colorado, being mineral entries numbers 24 and 641, and survey lots numbers 55 and 315, is forfeited by you, for the reason that you have not complied with the terms and agreements contained in said lease, and you and each of you are hereby notified to keep off said premises.

"J. S. UPDEGRAFF."

On the next day, Updegraff took possession of the property, locked the doors of the shaft house, and carried away the keys. He visited the premises frequently during 1891 to see if any one had broken in, but made no attempt to operate the mine. About the 23d day of January, 1892, the plaintiff sold the machinery, and gave the purchaser an order for its removal. The purchase price was paid. The plaintiff notified the defendant Updegraff, by letter dated January 23, 1892, of the sale or contemplated sale, and received from the latter a reply saying that the defendants owned the building, machinery and all improvements on the mine, and had a party in charge, with instructions to allow no one to remove anything from the premises. The plaintiff then returned the purchase money he had received, and, on the 30th day of March, 1892, commenced this suit.

The general rule respecting fixtures unquestionably is that whatever is once annexed to the freehold becomes part of it, and passes with the land. This rule obtains as between

grantor and grantee, mortgagor and mortgagee, and persons sustaining certain other relations to each other. 1 Washburn on Real Property, 4th Ed. *7. But there is an exception to the rule, which is probably as old as the rule itself, and which is applied as between landlord and tenant, to articles affixed by the latter to the premises for the purpose of carrying on the business for which the premises were leased. Such articles are denominated trade fixtures, and are removable by the tenant. *Lawton* v. *Lawton,* 3 Atk. 13; *Van Ness* v. *Pacard,* 2 Pet. 137; *Andrews* v. *D. B. Co.,* 132 N. Y. 348, 353; *Ferry Co.* v. *Railway Co.,* 142 U. S. 396; *Conrad* v. *Mining Co.,* 54 Mich. 249; *Pitkin County* v. *Brown,* 2 Colo. App. 473; *Ross* v. *Campbell,* 9 Colo. App. 38. And it does not matter much how firmly the articles may be attached to the land. In *Ferry Co.* v. *Railway Co.* the court said: "Whatever is affixed to the land for the purpose of trade, whether it be made of brick or wood, is removable at the end of the term. Indeed it is difficult to conceive that any fixture, however solid, permanent and closely attached to the realty, placed there for the sole purpose of trade, may not be removed at the end of the term." The articles in question here were placed upon the mining premises for the purpose of carrying on the business for which the lease was taken,—that is, for the purpose of working the mine. It was by means of them that the operations which the lease authorized were to be conducted. They were therefore trade fixtures. That they were intended merely to facilitate the work in which the lessees proposed to engage under the provisions of their lease, and that it was not their intention to incorporate them into the realty, appears to us to be clearly evident from the facts. *Conrad* v. *Mining Co., supra;* Tyler on Fixtures, 115.

But the general language of the books is that the right of the tenant to remove his fixtures must be exercised during his term of lease. And it is said that this rule applies not only to cases where the tenancy terminates by the lapse of

time, but also to cases where it is determined by the tenant's own act, as where he surrenders his lease to his landlord without reservation, or abandons the premises under such circumstances as to indicate a purpose not only to relinquish his possession and control, but also to permit the resumption of possession and control by the landlord. Ewell on Fixtures, 144, 145. In this case, the tenancy had not terminated by lapse of time, nor were the premises abandoned. The possession was not voluntarily relinquished, and there was no evidence of an intention to relinquish it. Down to the time when Updegraff locked up the shaft house, the plaintiff was in actual possession of the premises; and by the act of Updegraff at that time, he was forcibly dispossessed. If, for present purposes, we concede that the notice served by Updegraff upon the plaintiff had the effect of terminating the tenancy, then, as it was not by the act of the plaintiff that the tenancy was terminated, the rule to which we have referred does not apply. Where the tenancy expires by the terms of the lease, or is terminated by the voluntary act of the tenant, the situation is within his control, and it is his own fault if he fails to remove his fixtures in time. But where a period is put to his tenancy by the act of his landlord, and against his consent, the case is different. His term may end so suddenly that it is impossible for him to make any provision for taking away his property. In this case the notice of forfeiture was served on one day, and possession taken the next; and it is manifest that the plaintiff had no opportunity to remove his machinery. It belonged to him, he had the right to remove it, and his right could not be cut off, except by his own act or neglect. No opportunity having been afforded him of asserting his right prior to the termination of his tenancy, unless he could do so afterwards, there would be a failure of justice. The law does not exact impossibilities, and in cases where the tenancy is of uncertain duration, or is liable to be determined by the happening of

some contingent or uncertain event on which it depends, or by the act of the landlord, the tenant has a reasonable time after the termination of the tenancy for the exercise of his right. Ewell on Fixtures, 141, 147.

In the case of *Mickle* v. *Douglass*, 75 Iowa, 78, the defendants had leased to the plaintiffs a coal mine, reserving royalty for all coal mined. The lease provided that if the plaintiffs failed to pay the stipulated royalty within thirty days after it became due, and to faithfully perform the conditions of the lease, then the lease and all rights under it should be forfeited, and the defendants might so declare, and in a lawful manner take possession of the mine and all the property connected with it. Afterwards, the defendants elected to declare the lease forfeited on the ground that the plaintiffs had failed to comply with the terms, conditions and stipulations of the lease, particularly in not paying the royalty or rent. In response to the declaration of forfeiture, the plaintiffs surrendered the premises, but protested that by the surrender they did not intend to waive their right to remove their property within a reasonable time. The lease provided that any new engines, boilers or other machinery, buildings, houses and other property, placed in or upon the mine, and real estate, which was not in the nature of repairs, might be removed by the plaintiffs at the termination of the lease, unless all rights thereto had been forfeited by the plaintiffs by a forfeiture of the lease. The plaintiffs had erected certain houses on the premises which were not in the nature of repairs, and after their surrender of possession, demanded the houses from the defendants, and failing to obtain the property, brought suit to recover its value. The court held that the forfeiture clause applied to the possession of the mine and the rights of the plaintiffs under the lease, but not to property placed on the premises by the plaintiffs, and used for mining purposes; that the right to remove the buildings within a reasonable time after the lease was terminated by a forfeiture for non-

payment of royalties, was not lost by the forfeiture of the lease; and that the right to remove the buildings having been denied, an action might be maintained to recover their value. The clause permitting removal of the property at the termination of the tenancy, conferred no right upon the lessees which they would not have had without it, so that we regard the decision as pertinent. But independently of any direct authority, upon the hypothesis that the tenancy was in fact and in law terminated by the notice of forfeiture which was served on the plaintiff, and in conformity with general and well established principles, we should hold that is it was by the act of the defendants that a removal of the machinery from the mine before the termination of the tenancy was rendered impossible, they cannot be heard to deny the right of the plaintiff to a reasonable time afterwards in which to exercise his right. Now a reasonable time is not a fixed period. What would be a reasonable time in one case, would not be a reasonable time in another; so that in every case the question, what is a reasonable time, must be determined from facts and circumstances peculiar to that case. The nature of the act to be done, the situation of the parties, a duty or want of duty upon one to act promptly, and the effect of delay upon the rights of the other, must all be considered. In this case, between the 18th day of April, 1891, and the 22d day of January, 1892, no attempt was made by the plaintiff to remove his property. A case might exist in which such delay would be utterly inexcusable. The party against whom the right was asserted, might, in the meantime, have so moved that a retreat would involve him in annoying, if not worse, complications, and cause him inconvenience, if not loss. But the evidence here shows that during that time the defendants did nothing at all; that their situation in respect to the property was exactly the same on the 22d of January, that it was on the 18th of April; that there was in the mean time no manner of change in their position; and that by reason of

the delay they suffered no injury whatever. Upon this showing, we agree with the trial court that the time taken by the plaintiff in which to move, was not unreasonable.

In arriving at our conclusion, we have proceeded upon an hypothesis furnished to us by the defendants, namely, that in declaring the lease forfeited, Updegraff acted not only for himself, but for his colessors; that, therefore, by his declaration, the lease was forfeited, and the tenancy terminated; and, upon ground of their own choosing, it is our opinion that the plaintiff should prevail. But we are unable to admit that their position is well taken. These lessors were tenants in common. Each one held his undivided interest in his own right. Their relations to each other were not such that in respect to the common property, one could act for all without special authority. Upon the face of the notice of forfeiture, Updegraff was acting for no person but himself. He did not purport to act as agent for the others, and there was no evidence that he was such agent. His act could therefore be effective only as far as his own individual interest was concerned. *Pickard* v. *Perloy,* 45 N. H. 188; *Right* v. *Cuthell,* 5 East, 491; Freeman on Cotenancy, § 180; Taylor's Landlord & Tenant, 479. As to the others, the tenancy was not terminated; and until by their answer they adopted the proceeding of Updegraff, and made it their own, they assumed no responsibility on account of the notice of forfeiture. Although Updegraff had excluded the plaintiff from the premises, a tenancy which entitled the latter to possession continued to exist, and was in existence when this suit was commenced; so that the question within what time after forfeiture the plaintiff should have undertaken to remove his property, was, in reality, not in the case.

Errors are assigned upon the admission and exclusion of evidence. To specially notice all the objections would be impracticable, but it is unnecessary. Some of the rulings were of at least doubtful propriety; but the cause was tried

by the court, and the presumption is that improper evidence was not considered by it. There was enough to which no objection was made to sustain the findings and judgment of the court. In our own consideration of the case, the evidence, the propriety of which is disputed, has been almost entirely ignored; and we have allowed weight to none of it which we did not regard as correctly admitted.

Defendant Updegraff was asked by his counsel as follows: "Now state what conversation took place between you and Mr. Bolsinger at that time, if any, concerning this matter." A witness, Robert Williams, was asked whether the mine was worked in a workmanlike manner by the lessees, and what a Mr. Thomas said concerning the work; and Updegraff was asked whether or not Mr. Wisebart did anything in behalf of Mr. Lesem in regard to the property that was covered by the lease. The court refused to permit these questions to be answered. Respecting what matter counsel desired Mr. Bolsinger to answer, we were unable to satisfy ourselves from the context, but it probably concerned the manner in which the lessees had worked the mine. Mr. Bolsinger had been manager of the mine for them. At the time of the supposed conversation, the mine was not being worked at all, and Mr. Bolsinger was not acting as manager. The declarations of an agent are binding upon his principal only when he is engaged in the transaction of the business of his agency. Mr. Thomas was a foreman employed by Bolsinger upon the mine, and his declarations were of no more importance than the declarations of any other of Bolsinger's employees. What the question in relation to Wisebart meant, there was nothing on its face to indicate. Apparently it was immaterial, and counsel did not undertake to show how it could become material by a statement of what they proposed to prove. See *Farwell* v. *McGraw*, 13 Col. App. 467. But, in addition to what we have said, for any purpose of this case, it was a matter of no consequence in what manner the

mine was worked. No such question was in issue. Improper work would have been good cause for declaring the lease forfeited, but until a legal declaration of forfeiture was made, the tenancy existed. The plaintiff owned the articles in controversy, and the only questions were whether a forfeiture had been declared, and, if so, whether the plaintiff claimed his property within a reasonable time after the event. Misworking of the mine would not affect his title, and would constitute no objection to a recovery by him. The lease provided what the remedy of the lessors should be for improper work, or any other violation of the terms of the lease, and that remedy was not the retaining by them of the improvements. The court certainly did not err in the rejection of the evidence.

Complaint is made that the court permitted evidence in rebuttal which should have been given in chief. The allowance of such evidence is very largely within the discretion of the trial court; and such discretion is never interferred with by appellate courts, without some better reason than is urged here. But if it was error to admit the evidence, the error was harmless. The new proof added nothing to the case as it had been made. As affecting the only questions upon the resolution of which the fate of the controversy depended, it was without materiality.

The reply by Updegraff to the plaintiff's letter of January 23, 1892, was evidence of a conversion by him of the property; and the other defendants, by adopting his act in their answer, made it their own. The court found the value of the property at the time of the conversion to be $1,500, and there was evidence to justify the finding. The court further allowed damages for the detention of the property in the sum of $696, being equivalent to the legal interest on its value from the date of the conversion. There was no error in this. The rule in this state is that damages are allowable for the detention equal to the legal interest on the value of the chat-

tels converted from the time of the conversion to the time of judgment. *Omaha Sm. & R. Co.* v. *Tabor,* 13 Colo. 41; *Sutton* v. *Dana,* 15 Colo. 98; *Perkins* v. *Marrs,* 15 Colo. 262.

We find no error in this record which would warrant us in reversing judgment, and it is therefore affirmed.

Affirmed.

HALL v. DUKE OF NORFOLK.

(L. R. 2 Chancery (1900) 493. Supreme Court of Judicature. June 14, 1900.)

[1]**The right of action does not accrue until the damage results.**

[2]**No liability for results of predecessor's mining.** The owner of minerals is not liable for damage caused to neighboring land by subsidence occasioned by the working of the minerals by his predecessor in title, although the damage did not actually occur until after the owner came into possession.

Action to have it ascertained what damage the plaintiff's house and property, situate at Overseal, near Ashby-de-la-Zouch, had suffered by reason of the working out of the main coal seam in the adjoining Moira Colliery of the defendants; a declaration that the defendants were liable to make good such damage; and payment accordingly.

[1]The date in the cause of action is the date of the neglect, not the date of the cave. Operator not liable for his predecessor's neglect. Evidence of like conditions and like effects in other mines not admissable. *Noonan* v. *Pardee*, 200 Pa. 474; 21 M. R. —.

Damages from results not yet occurred allowed to be recovered. *McGowan* v. *Bailey*, 17 M. R. 425.

[2]Lessee not liable for subsidence caused during his term by the undermining of previous lessees. *Greenwell* v. *Low Co.* L. R. (1897) 2 Q. B. Div. 165.

As to liability for subsidence caused by draining away subterranean water or mining pitch, a semi-fluid substance: See *Jordeson* v. *Sutton Co.* L. R. 2 Ch. (1899) 217, and *Trinidad Asphalt Co.* v. *Ambard*, *Id.* 260.

Canal not entitled to the lateral support of minerals not under but near its bed. *Chamber Colliery* v. *Rochdale Canal*, L. R. App. Ca. (1895) 564.

When an express statutory right exists to maintain anything which requires surface support, the right of support exists by implication. *London Ry.* v. *Evans*, L. R. 1 Ch. (1893) 16. The same as to granted rights. *Gt. Western Ry.* v. *Cefn Co.* L. R. 2 Ch. (1894) 164. But in *London Ry.* v. *Evans*, L. R. 2 Ch. Div. (1892) 432, the right of support to the canal in question was denied.

The plaintiff was the owner in fee simple of his property, and he alleged that his house had been built more than fifty years before the acts complained of.

The plaintiff's land adjoined land of which the late Lord Donington was the owner in fee, and which comprised certain seams of coal, and a colliery carried on in connection therewith known as the Moira Colliery. In the years 1889 to 1891 Lord Donington worked one of the seams of coal in close proximity to the plaintiff's property.

Lord Donington died on July 24, 1895, having by his will dated April 2, 1892, devised and bequeathed all his real and personal estate to trustees upon certain trusts. The trustees, the Duke of Norfolk and G. E. Lake (since deceased), carried on the business of the colliery as trustees under a power in the will from the death of the testator to October 1, 1895, and from that date to November 16, 1895, as agents for Messrs. Wilkinson, Newton & Spalding. On November 16, 1895, they agreed to demise the colliery to Wilkinson, Newton & Spalding for a term of twenty-one years from October 1, 1895, and on November 20, 1895, Wilkinson, Newton & Spalding assigned the benefit of the agreement, and gave possession of the colliery to the Moira Colliery Company. The lessees did not enter into any covenant to prevent damage by subsidence. In and subsequently to November, 1895, subsidences occurred in the plaintiff's land, and the walls and ceilings and various other parts of the house cracked. This was in consequence of the workings by Lord Donington between 1889 and 1891, and was not traceable to any act of the trustees or their lessees. In 1896 an

The change of surface use from a horse tramway to a steam railway does not invalidate the right of support granted to the original company. *Gt. Western Co.* v. *Cefn Co.* L. R. 2 Ch. (1894) 157.

Where the surface and the minerals are severed estates there is a *prima facie* presumption in favor of the right of support, but the words or context of the grant or act may rebut the presumption. *Bell* v. *Earl of Dudley*, L. R. 1 Ch. (1895) 182.

action to adminster the estate of the late Lord Donington was brought by a creditor. On March 25, 1897, the plaintiff in the present action carried in a claim in the administration action against the estate for £2,000, in respect of the damage alleged to have been caused to his property by the subsidence. The claim came before Kekewich J. for adjudication on December 17, 1898, when it was dismissed with costs, the judge being of the opinion that the claim was in the nature of a personal action which was determined by the death of Lord Donington. The plaintiff then brought this action against the trustees and Messrs. Wilkinson, Newton & Spalding, and the Moira Colliery Company. He alleged that no steps were ever taken by Lord Donington during his life, or by any of the defendants subsequently, to prevent the plaintiff's land and buildings from being damaged by reason of the working of the seam.

It was not exactly proved when the damage to the plaintiff's property first occurred, but the inference drawn by the judge from the evidence was that it did not occur until at any rate after the demise by the trustees to the lessees.

P. O. LAWRENCE, Q. C. and MACSWINNEY, for plaintiff. This colliery was in a dangerous condition in 1895, and it was physically possible for the defendants to prevent the subsidence. The defendants not having taken steps to put the colliery into a safe condition, they are liable for the injury occasioned by the subsidence, although it was caused by the act of their predecessor. The claim for damages arises when the injury takes place, and it is against the owner of the property for the time being. The doctrine of *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330, applies to this case. The Duke of Norfolk, the surviving trustee, is liable as reversioner upon the principle that if a man acquires property with a continuing nuisance upon it, and then lets the property without either putting an end to the nuisance himself or com-

pelling his lessees to do so, he is responsible for the continuance of the nuisance during the term: *Rex* v. *Pedly*, 1 Ad. & E. 822, 40 R. R. 444. *Todd* v. *Flight* (1860) 9 C. B. (N. S.) 377. *Pretty* v. *Bickmore* (1873) L. R. 8 C. P. 401, and the lessees are also liable, notwithstanding that the nuisance existed before they took possession: *Broder* v. *Sailard*, (1876) 2 Ch. D. 692. *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127, is very like this case, and it is important as showing that the cause of action does not arise till the subsidence takes place.

It is true that the decision of Bruce, J., in *Greenwell* v. *Low Beechburn Coal Co.* (1897), 2 Q. B. 165, is adverse to the plaintiff's claim; but we submit that it is inconsistent with the current of authority, and especially with *Backhouse* v. *Bonomi* (1861), 9 H. L. C. 503, and *Darley Main Colliery Co.* v. *Mitchell, supra*, and ought not to be followed.

WARRINGTON, Q. C., and KENYON PARKER, for the defendant, the Duke of Norfolk, the surviving trustee. Unless this case can be brought within the principle of *Todd* v. *Flight, supra*, this action must fail. In that case it was held that there was a duty on the lessor to keep the property in a safe condition. Here there is no obligation on the lessor to put back the minerals which have been excavated, and he is not liable unless the wrong causing the damage arises from his misfeasance or nonfeasance. There is no authority that a man who acquires land with a cavity in it is bound to fill it in. *Greenwell* v. *Low Beechburn Coal Co., supra*, admittedly covers this case, and it is not really inconsistent with *Darley Main Colliery Co.* v. *Mitchell, supra*. In the latter case the question to be determined arose under the Statute of Limitations, and was as to the time when the cause of action was complete; the House of Lords did not determine against whom the action could be brought. It was held that the cause of action was complete when the damage by sub-

sidence occurred; because it is not the removal of the minerals by the defendant, the owner of them, which gives rise to the cause of action, but the damage to the plaintiff resulting from the removal: unless these two elements exist in combination the cause of action against the defendant cannot be complete.

[Kekewich, J., referred to the remarks on *Backhouse* v. *Bonomi, supra,* in the judgment of Lord Blackburn in *Darley Main Colliery Co.* v. *Mitchell, supra.*]

The person who happens to be the owner at the time of the subsidence is not liable for that which is the result of an act of one of his predecessors, committed, it may be, many years ago. The question might arise in such a case, for instance, as *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.,* (1899) 2 Ch. 217, were the subsidence was caused by drainage of subsoil owing to an excavation in neighboring land. To make a man liable for a subsidence, he must have done something to cause it. The mere possession of land with a cavity in it made by some one else is not sufficient.

There is no evidence of any damage continuing during the time of defendant's possession. The case is not like *Todd* v. *Flight, supra.* In that case the lessor of the premises which were the cause of the damage was held liable because he had assumed a responsibility himself. In *Pretty* v. *Bickmore, supra,* the landlord was held not liable for the accident caused by the premises being out of repair, he having no duty to keep them in repair.

The trustees had no duty to prevent the subsidence, and there is no evidence that they could have prevented it even if they had such a duty.

RENSHAW, Q. C. and ASHTON CROSS, for the defendants other than the Duke of Norfolk. There is no evidence that apart from the additional weight of the house there would have been any subsidence at all. If the case depends on the house, it is not a case of natural support, but of an easement

for a house which was erected more than twenty years ago: *Dalton* v. *Angus,* (1881) 6 App. Cas. 740. The lessees cannot be liable for an interference with an easement committed before they came into possession. It was not caused by any act of theirs.

There are two things which give a right of action in cases like this—the removal of the minerals which produces the cavity, and neglect to provide artificial support: *Mitchell* v. *Darley Main Colliery Co.,* (1884) 14 Q. B. D. 125, 129. *Greenwell* v. *Low Beechburn Coal Co., supra.* The lessees had nothing to do with the removal of the minerals. Neither were they negligent in not filling up the cavity. They could not be liable in that respect unless they had some duty in the matter, and they had none: *Pretty* v. *Bickmore, supra.* The mere fact of their being in possession cannot make them liable for what took place before they came into possession.

The decision of Bruce, J., in *Greenwell* v. *Low Beechburn Coal Co., supra,* is not inconsistent with what was held by the House of Lords in *Darley Main Colliery Co.* v. *Mitchell,* 11 App. Cas. 127. The point there was the same as the point in this case, and it is an authority that no damages ought to be given against the lessees.

P. O. LAWRENCE, Q. C., in reply.

KEKEWICH, J., referred to the facts observing that the working of the coal by Lord Donington was a perfectly rightful act, and that the subsidence resulting therefrom had caused the plaintiff damage in respect of which he might have maintained an action against the late Lord Donington. He continued: The damage not having occurred until the end of 1895, according to settled law, the right of action did not accrue until then. The Statute of Limitations, therefore, does not apply, and the matter for consideration is whether the plaintiff can recover damages, to be ascertained by some

means or other, as against the defendants whom he has brought before the court. The question then arises "whether, on the general principles of law, the defendants can be rendered liable upon the ground that they have allowed a nuisance to continue on their land which has caused damage to the plaintiff." Those are the words of Bruce, J., in his judgment in *Greenwell* v. *Low Beechburn Coal Co., supra.* He was there stating the question which he had to decide, which is precisely that which I have to decide, and he decided it against the plaintiff in that case, and in favor of the defendants. It is possible that I might be doing my duty if I were simply to follow that decision; but I have thought it right to consider the question for myself. The decision of Bruce, J., was pronounced only three years ago, and has not so far as I am aware been cited or commented upon in any other case. It was admitted by him that there was no reported case or judicial decision upon the point except one by the present Lord Justice Collins, of which he could not get any trustworthy report, and upon which, therefore, he declined to say anything. Besides that, it is said here that the decision of Bruce, J., is not consistent with the decision of the House of Lords in *Darley Main Colliery Co.* v. *Mitchell, supra.* Under those circumstances I have heard full argument, and have also taken the opportunity afforded by the adjournment from yesterday to look into the case and fully consider it.

Unless I am controlled by the decision in *Darley Main Colliery Co.* v. *Mitchell, supra,* or by the opinion of Lord Blackburn in that case, it seems to me that I am not at liberty to do that which I must do if I acceded to the plaintiff's contention—namely, create a right of action, which has never yet been recognized in a court of law. Without going through the argument which formed the basis of the judgment of Bruce, J., I may say that I entirely agree with the learned judge from beginning to end. He puts his deci-

sion on this ground (1897, 2 Q. B. 177), the ground which has been much insisted upon in the argument on behalf of the Duke of Norfolk: "What act has been done which it was the duty of the defendants to take due care to prevent? The answer must be that they have not taken due care to prevent the subsidence." Every word of that applies to the present case. Then he adds: "But what duty was there on their part to prevent subsidence. They had taken no part in the excavation." That also applies to the present case. Then further on he says: "Unless they are under an obligation to prevent the consequences of an act done by their predecessor in title, they have not been guilty of any omission of duty for which they can be rendered liable. It is suggested that the excavated strata left without any artificial support amounted to a nuisance; but I do not think they did. Until the actual subsidence happened there was nothing unlawful in the state in which the land was left. At no moment prior to the subsidence can it be said that there was any duty upon anyone to provide artificial support; and, therefore, it seems to me that it cannot be said that the defendants are guilty of a default of duty in allowing a state of things to continue which was a perfectly lawful state of things." That latter passage expresses in other words the opinion of Lord Bramwell in *Darley Main Colliery Co.* v. *Mitchell,* 11 App. Cas. 144, 145, where he draws the distinction between the case of a thing directly wrongful in itself, the case "where the wrong is not actionable in itself, is only an injuria, but causes a damnum," and, thirdly, the class of cases "where the act causing the damage is not in itself wrongful" (which is the case with which Bruce, J., was dealing and with which I am dealing), and the only wrong is attributable to the damage which has been caused.

It was said here that the case came within *Todd* v. *Flight,* 9 C. B. (N. S.) 377, but in that case there was a clear breach of duty. A man in possession of premises on which there

was a stack of chimneys in a dangerous condition, and therefore a nuisance, demised to a tenant without putting him under any terms to repair the chimneys, and the result was that the chimneys fell and injured the neighbor, and then the lessor was held liable on the ground that it was his duty to repair the chimneys, or, at any rate, to see that the tenant repaired them. The plaintiff also relied on *Rex.* v. *Pedly,* 1 Ad. & E. 822; 40 R. R. 444. As to that case, it is sufficient for me to read what was said by Creswell, J., in delivering the judgment of the court in *Rich* v. *Basterfield* (1847), 4 C. B. 783, 805. He said: "If *Rex* v. *Pedly, supra,* is to be considered as a case in which the defendant was held liable because he had demised the buildings when the nuisance existed; or because he had relet them after the user of the buildings had created a nuisance; or because he had undertaken the cleansing, and had not performed it;—we think the judgment right, and that it does not militate against our present decision. But, if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance, by the manner in which he uses the premises demised—we think it goes beyond the principle to be found in any previously decided case; and we cannot assent to it." That puts the basis of the decision in *Rex* v. *Pedly, supra,* as well as of that in *Todd* v. *Flight, supra,* on the ground of duty. *Pretty* v. *Bickmore,* L. R. 8 C. P. 401, where *Todd* v. *Flight, supra,* was referred to by Bovil, C. J., agrees with that. In that case also the decision was based on the ground of duty. There was a plate over a coal cellar which was in a dangerous state, and the defendant, who was the landlord, had let the premises to a tenant, taking from him a covenant to repair, and it was held that, the duty of keeping the premises in repair being by the lease cast upon the tenant, the landlord was not liable. That is instructive in this way. It might be argued in such a case that as between the plaintiff and the defendant the delegation of the defendant's duty to

the tenant was no answer, and that the plaintiff was entitled to say, "You let the premises in a dangerous condition, as did the landlord in *Todd* v. *Flight, supra,* and it is no answer to me to say that you have obtained a covenant from somebody else, your tenant, to do that which you ought to have done yourself. That is a matter between you and him, and I am entitled to sue you for your neglect notwithstanding that you have a right of action over against the tenant for his neglect." But that argument did not prevail in *Pretty* v. *Bickmore, supra.* It was there held that the person who was directly liable to repair, not to the plaintiff, but whose duty it was to repair, was liable, and not the person on whom that duty was not cast. It seems to me, therefore, that unless it can be shown that Bruce, J., misunderstood the case of *Darley Main Colliery Co.* v. *Mitchell, supra,* so that his decision does not really apply in this case this action must fail on the grounds which satisfied him in *Greenwell* v. *Low Beechburn Coal Co.* (1897), 2 Q. B. 165.

Turning now to *Darley Main Colliery Co.* v. *Mitchell, supra,* it seems to me that that case, when properly understood, has very little to do with the present case. The question there arose in this way: It had been settled by previous decisions, and particularly by *Backhouse* v. *Bonomi,* 9 H. L. C. 503, that where a subsidence occurred through coal workings the right of action on the part of the person damaged by the subsidence arose when the damage occurred, and not when the coal was removed; and, therefore, the Statute of Limitations ran from the latter date and not from the former. Then arose the further question, whether, when coal is worked, and after a time a subsidence occurs in consequence of that working, and after further time, it may be several years, a further subsidence occurs in consequence of the same working, the right of action is one and the same throughout. If so the neighbor being damaged would be bound to recover the whole damage in an action on

the first subsidence, estimating as best he could the possible damage to be caused thereafter, and the Statute of Limitations would run against him, and he might find himself barred if another subsidence and further damage did not occur for some years. That was what gave rise to the discussion in *Darley Main Colliery Co.* v. *Mitchell, supra,* and the House of Lords decided that there was a new cause of action with the new subsidence and the new damage. That was the whole of the decision in that case. I cannot find that the house disposed of any other question at all; but Lord Blackburn dissented from that, and his judgment, of course, deserves the closest attention. It is not, perhaps, one of his lordship's most forcible judgments, but still, on reading it through, I have no doubt as to his meaning. He admitted the general principle that all the damages must be recovered at once, in one and the same action. He went through all the authorities, and came to a conclusion differing from that at which all the other members of the house who took part in the decision arrived. That does not affect this case in the least, but towards the end of his judgment (11 App. Cas. 144) he quotes the following passage from the judgment of Bowen, L. J., in the court below (14 Q. B. D. 138): "Applying the reasoning of *Whitehouse* v. *Fellowes* (1861), 10 C. B. (N. S.) 765, 784, it seems to me that there has really been, not merely an original excavation or act done, but a continual withdrawal of support." Bowen, L. J., had applied the reasoning of *Whitehouse* v. *Fellowes, supra,* and came to that conclusion in fact and in law; and Lord Blackburn says: "If I could take that view of the facts, I should agree in the conclusion. But I cannot take that view of the facts." It is perfectly clear that what Lord Blackburn means there was this: "If I could see any way to agreeing with the Lord Justice, that really there had been a continual withdrawal of support and not merely an original excavation or act done, then I should agree also in the conclusion at which

he arrived, but I cannot take that view of the facts"; and then he adds: "One consequence of doing so would be that where the owner in fee of a seam of coal worked it out, and died leaving it in this state, the heir of the land in which the worked out seam lay would be liable to an action for continuing a nuisance. Surely, the facts cannot be such as would produce that effect." I suppose he did not mean that the facts could not be so, but that it would take a good deal to drive him to conclude that the facts were such as to produce that effect. On studying it I cannot see any other way of reading it than as an expression of opinion directly contrary to the present plaintiff, and not in his favor. Lord Blackburn in effect says: "I cannot believe that the facts are such as to induce the legal conclusion that where an owner in fee of coal works it out and dies his heir or devisee is liable for continuing nuisance." Yet that is the very position that the plaintiff takes up in this case. I find it extremely difficult to see why it should be said that Lord Blackburn in that part of his judgment was differing from the conclusion of the House of Lords. He is not commenting upon that. He is quoting the language of Bowen, L. J., and saying that he did not see his way to agree with his facts, and, therefore, he could not agree with his conclusion. Moreover, I have support for that view, for Bruce, J., after referring to this part of Lord Blackburn's judgment, says (1897, 2 Q. B. 176): "When the passage of Lord Blackburn's judgment is carefully examined it seems to me that it does not afford support to the contention that such consequences as he mentions follow from holding the Darley Main Colliery Company liable upon the grounds upon which the House of Lords held them liable."

That seems to me to entirely dispose of the case, and I need not go into the question raised as against the lessees; the case as to them is covered by my decision in favor of the Duke of Norfolk. Nor need I consider the question

whether the defendants might, if they had been so minded, or if any duty had been cast upon them to do it, have prevented this damage by doing something. (His Lordship, however, dealt briefly with the evidence on this head, and concluded as follows:)

It is not proved here that if the cavity had been filled up the subsidence would not have taken place just the same. Therefore, even if I thought that the point was of importance —which, in the view I take of the case, it is not—I should have been obliged to decide against the plaintiff on that point also.

The result is that my judgment is for the defendants with costs.

Solicitors: WOODCOCK, RYLAND & PARKER, for Woodcock & Sons, Haslingden; WORDSWORTH, BLAKE & Co.; KINGSFORD, DORMAN & Co., for Smith, Mammatt, Hale & Quarrell, Ashby-de-la-Zouch.

SIR FREDERIC JOHNSTONE v. CROMPTON & Co.

(L. R. 2 Chancery (1899) 190. June 16, 1899.)

[1]**Facts of the case.** Defendants, lessees of land with a reservation of "all mines and minerals within or under the said land" were sinking a bore hole 18 inches diameter the intended depth of 400 feet. They would necessarily penetrate a seam of building stone and a seam of coal but neither of them commercially workable. *Held*:

That commercial value was not the test and that such mineral seams being the property of plaintiff, the defendants should be enjoined from penetrating them.

Motion to restrain the defendants from making or permitting to be made in or under the lands demised by or comprised in an indenture of lease dated September 30, 1860, any excavations or underground borings, or from removing any mines or minerals in or under the said lands, or from interfering with the use and enjoyment by the plaintiffs of the said mines or minerals.

[1]*Armstrong* v. *Auen*, 17 M. R. 397. *Hext* v. *Gill*, 17 M. R. 1.

Deed reserving right to prospect does not convey a fee simple. *Adams* v. *Reed*, 11 Utah 480; 40 Pac. 720.

Construction of exception of all minerals. *Thompson* v. *Mattern*, 115 Pa. 501; 9 Atl. 70.

A deed reserving "all valuable earths, clays, stones, paints and substances for the manufacturing of paints" construed to reserve brick clay. *Foster* v. *Runk* (Pa.); 2 Atl. 25.

Reservation of all mines and minerals held to cover limestone ledges. *Brady* v. *Brady*, 65 N. Y. S. 621.

Marble is a mineral in a reserve of mines and minerals. *Phelps* v. *Church, etc.* 115 Fed. 882; 22 M. R. —.

Reservation of "the minerals of all the precious kinds." *Pearne* v. *Coal Creek Co.* 90 Tenn. 619; 18 S. W. 402.

The statement of the case shows that the real injury of the bore hole was that it would flood valuable mines, but the court place their decision solely on the abstract property rights of the parties.

R. S. M.

By an indenture of lease dated September 30, 1860, and made between Thomas, Earl of Wilton (the predecessor in title of the plaintiff Sir Frederic Johnstone) of the one part, and Thomas Mucklow (through whom the defendants claimed) of the other part, three closes, fields, or parcels of land situate in the township of Ainsworth, forming part of the Heaton estates, together with the printworks, dye-house, bleachworks, messuage, dwelling house, erections and buildings thereon, and the reservoirs of water situate thereon, and the use and enjoyment of all water usually flowing on to the lands thereby demised from the adjoining lands of the said Earl, with their appurtenances, "except nevertheless and always reserving out of this demise all mines and minerals within or under the said land with liberty for the said Earl and his assigns and other the person and persons for the time

Construction of reservation of lead mining rights. Construed as an estate. *Bonson* v. *Jones*, 89 Ia. 380; 56 N. W. 515.

Reservation of sufficient coal for domestic use is not transferable. *Hull* v. *Delaware Canal* (Pa.) 4 Atl. 471.

Reservation of the right of grantor getting coal for his own use is not a reserve of all the coal. *Algonquin Co.* v. *Northern Co.* 162 Pa. 114; 29 Atl. 402.

Reservation of coal in general terms upheld and the description held not too indefinite. *Lulay* v. *Barnes*, 172 Pa. 331; 34 Atl. 52.

Construction of will. The devise of coal under certain farms held not to pass the same vein where found to extend under other land of testator. *Cruzen* v. *Boughner*, 196 Pa. 12; 46 Atl. 103.

The grantee of land by deed reserving minerals cannot destroy the reservation by purchase of outstanding title. *Sandy River Co.* v. *White House Co.* (Ky.); 72 S. W. 298.

Grant of lands reserving minerals construed not as an exception but as a re-grant of license and such license not exclusive. *Duke of Sutherland* v. *Heathcote*, L. R. 3 Ch. Div. (1891) 504; L. R. 1 Ch. Div. (1892) 475.

Land was conveyed reserving "the use and occupancy of any one of the coal banks on said land" to be thereafter selected: There were six coal seams under the land. On ejectment brought for one seam by name, it was held that only an easement was reserved and that ejectment would not lie. *Chapman* v. *Mill Creek Co.* — W. Va. —; 46 S. E. 262.

being entitled to the reversion immediately expectant on the determination of the term hereby created and their agents and workmen at all times to drain, get and dispose of the said mines and minerals at his and their free will and pleasure, nevertheless not breaking open nor doing any damage to the surface of the land hereby demised or the buildings thereon and making reasonable compensation to the said lessee, his executors, administrators or assigns, or his or their tenants for all damage thereby occasioned," were demised by the said Earl to the said Thomas Mucklow for the term of ninety-nine years, from September 29, 1860, without impeachment of waste at the yearly rent of £150, and subject to the covenants by the lessee and conditions therein contained.

By an indenture of lease, dated March 17, 1896, and made between the then Earl of Wilton, of the one part, and Thomas Fletcher, of the other part, all those mines of coal and cannel known by the names of the "Trencherbone" and the "Cannel" mines, lying under parts of the Heaton estate, together with full liberty to work, win, and get the said mines, were demised to the said Thomas Fletcher for the term of twenty-one years from March 25, 1896, subject to the payment of the dead rent and royalties therein mentioned.

The mines demised by the lease of March 17, 1896, comprised mines known as the "Trencherbone" and Cannel" mines, lying under the lands demised by the lease of September 30, 1860.

The lease of September 30, 1860, was assigned to the defendants Crompton & Co. in or about the year 1897. The lease of March 17, 1896, was assigned to the plaintiff company, Thomas Fletcher & Sons, limited, on May 16, 1898.

It appeared from the evidence that the defendants had recently commenced to excavate and sink a bore hole about eighteen inches in diameter in and through the mines and minerals reserved by the lease of 1860, and that they in-

tended to sink the said borehole to a depth of about 400 feet, so as to ensure their piercing the rock known as "cannel rock," lying immediately above the cannel mines, and obtaining water therefrom. It appeared that in order to reach the cannel rock the borehole must pass through the following strata, namely, surface clay, redrock, red metal, fireclay, coal, and Trencherbone coal, and that the defendants had already bored through the redrock and a stratum of coal from six to eight inches in thickness. It also appeared that the cannel rock contained large quantities of water which, when reached by the borehole, would, through pressure, rise to the surface, and in so doing would flood all the strata above it which were pervious to water, including the Trencherbone coal and Trencherbone rock, and that the consequence of such flooding would inevitably be that when the coal above the cannel rock was worked the workings would become flooded, and that the flooding would extend through all the connections made or to be made with those workings, and that irreparable injury would be done, not only to the mines and minerals under the lands demised by the lease of September 30, 1860, but to the adjoining mines.

The main question was whether, having regard to the reservation in the lease of 1860, the boring through the strata of redrock and coal, from six to eight inches in thickness, was a boring through, and, therefore, a trespass upon, the reserved minerals.

It was conceded that the redrock and coal in question could not be commercially worked at a profit at the present time.

FARWELL, Q. C., and CANN, for the plaintiffs. The principle laid down in *Hext* v. *Gill*, L. R. 7 Ch. 699, we submit, governs the present case. The redrock and the coal through which the defendants have already bored, though they cannot now be worked at a profit, are substances which can be

got from underneath the surface of the earth for the purpose of profit, and therefore fall within the reservation as being minerals. The definition given in the judgment of Mellish, L. J., in that case has not been affected by the judgments in the House of Lords in the case of *Lord Provost and Magistrates of Glasgow* v. *Farie,* 13 App. Cas. 657. The test is, not whether the minerals could be worked at a market profit at the time, but whether they had a use and a value of their own independent of and separable from the rest of the soil: *Earl of Jersey* v. *Neath Union,* 22 Q. B. D. 555. We submit that we are entitled to the injunction as asked.

MACSWINNEY, and H. P. LOWE, for the defendants. Doubt has been thrown on the accuracy of the definition in *Hext* v. *Gill,* L. R. 7 Ch. 699, by the House of Lords in *Lord Provost and Magistrates of Glasgow* v. *Farie,* 13 App. Cas. 657. The reservation in the lease of 1860 can only be held to apply to minerals which can be worked at a profit, and cannot apply to these thin layers of redrock and coal. This is clear on reference to the proviso giving liberty to the Earl and his assigns at all times, to drain, get, and dispose of the mines and minerals at his and their free will and pleasure, nevertheless not breaking open nor doing any damage to the surface of the land. This proviso tends to show that the reservation cannot have been intended to include the strata in question lying under the surface. We submit that we are not committing a trespass, and that we are entitled to continue the boring.

(They also referred to *Nisbet Hamilton* v. *North British Ry. Co.* (1886), 13 R. 454, and *Midland Ry. Co.* v. *Robinson* (1889), 15 App. Cas. 19.

FARWELL, Q. C. in reply.

BYRNE, J. In this case the plaintiffs seek for an

injunction to restrain the defendants from boring beneath the surface of certain property which is demised to them, the object of the boring being to obtain water. On the evidence as it at present stands water cannot be obtained without boring to such a depth as to penetrate the cannel coal, which lies at a very considerable depth from the surface. The defendants are lessees under a lease dated September 30, 1860, whereby certain lands were demised (his Lordship read the lease as above set out, and proceeded:) Now it is in evidence that there is danger should the cannel coal be penetrated, or should a seam called the "Trencherbone coal" be penetrated and water be subsequently obtained of very considerable flooding of other property, belonging to the plaintiffs, which would be the consequence of the operations which have been commenced. I have before me a plan showing the nature of the material through which the boring has gone and will have to go should it be continued. There is first of all the surface clay, then next to that comes redrock and red metal, then coal six to eight inches, then bands of coal, then metal, and below that again redrock porous, then thin coal, and then the Trencherbone coal; and below that again there is redrock and metal, and then thin bands of coal; and ultimately, at a very considerable depth, you get to cannel coal. At present the defendants have only bored to the six to eight-inch coal—that is the highest near the surface. They have bored through the redrock.

The question which has been argued before me is whether, having regard to the reservation in the lease, the boring through the redrock and the coal is boring through, and therefore a trespass upon, the reserved mines and minerals, or rather the reserved minerals. It is conceded that this redrock and the coal in question cannot be commercially worked to a profit at the present time.

It is said, on the other hand, by the defendants, that the true meaning of the reservation is only to reserve such minerals as can be worked for a commercial profit. It is also

said that, assuming the redrock and the coal in question can be construed to come within the term minerals in the reservation, nevertheless there is such a context as would render it necessary to put such a construction on that reservation as to show that in this particular document it referred only to such minerals as can be got at a profit. That is founded on the expression "with liberty at all times to drain get and dispose of the said mines and minerals at his and their free will and pleasure, nevertheless not breaking open nor doing any damage," and so on, in the words I have already read.

I had better deal with that point first. I do not think, on a fair construction of this reservation, if without that power the clause in question includes such substances as are said to be minerals in the present case, that the use of the subsequent words giving power to drain, get, and dispose of would limit the use of the word "minerals" in the way suggested. Therefore, it occurs to me that the true question is whether a reservation of mines and minerals refers only to substances properly coming within those words which can be commercially worked to a profit.

Now, the first case to which I propose to refer is, and has been for many years regarded, as a leading case on this branch of the law—I mean *Hext* v. *Gill,* L. R. 7 Ch. 699—and, without going into the circumstances of that case, I refer at once to a passage in the judgment where Mellish, L. J., says (L. R. 7 Ch. 712): "But the result of the authorities, without going through them, appears to be this: That a reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning." Then the learned judge proceeds to consider whether it ought to have a more limited meaning in the case then before him.

In the case of *Lord Provost and Magistrates of Glasgow* v. *Farie,* 13 App. Cas. 657, a question arose as to the meaning

within the Waterworks Clauses Act, 1847, of a reservation of the "whole coal and other minerals in the land," in terms of the Waterworks Act, 1847. The words in s. 18 of the Act being, "any mines of coal, ironstone, slate or other minerals, etc.," and there was some discussion as to the true meaning of *Hext* v. *Gill, supra,* in the course of that case. Lord Halsbury, L. C., says (13 App. Cas. 669): "I cannot help thinking that the true test of what are mines and minerals in a grant was suggested by James, L. J., in the case of *Hext* v. *Gill,* which I shall have occasion hereafter to refer to, and although the Lord Justice held himself bound by authority so that he yielded to the technical sense which had been attributed to those words, I still think (to use his language) that a grant of 'mines and minerals' is a question of fact 'what these words meant in the vernacular of the mining world, the commercial world, and landowners,' at the time when they were used in the instrument"; and later on he refers to the language of Mellish, L. J., in *Hext* v. *Gill.* He refers to the summing up of the authorities, and then he says: "I cannot myself assent to such a definition. In the first place it introduces as one element the circumstance that the substance can be got at a profit. It is obvious to see that if that is an essential part of the definition the question whether a particular substance is or is not a mineral may depend on the state of the market, and it may be that a mineral one year is not a mineral the next." Then Lord Macnaghten says (13 App. Cas. 689): "In some of the reported cases it seems to be laid down, or assumed that to be a mineral a thing must be of commercial value, or workable at a profit. But it is difficult to see why commercial value should be a test, or why that which is a mineral when commercially valuable should cease to be a mineral when it cannot be worked at a profit." Lord Herschell says (13 App. Cas. 685): "I think the reservation must be taken to extend to all such bodies of mineral substances, lying together in

seams, beds or strata as are commonly worked for profit, and have a value independent of the surface of the land."

The observations of the learned Lords in the case of *Lord Provost and Magistrates of Glasgow* v. *Farie* were fully considered in the case of *Earl of Jersey* v. *Neath Union,* 22 Q. B. D. 555. I will venture to take from the judgment of Bowen, L. J., his view of what was meant by the summing up of Mellish, L. J., of the authorities in *Hext* v. *Gill,* and he deals with that matter in reference to the criticism of Lord Halsbury, L. C., to which I have already referred in the case of *Glasgow* v. *Farie.* The passage I refer to is at p. 562, where the Lord Justice says: "I would only say with regard to Lord Halsbury's criticisms on *Hext* v. *Gill,* I cannot help thinking either that he has not been perfectly reported, or else the Lord Chancellor had not in his mind at the moment the exact canon of construction of Mellish, L. J., because Mellish, L. J., does not say, nor, I think, mean, that the test was whether the minerals could be worked at a market profit at the time, but whether they had a use and a value of their own independent of and separable from the rest of the soil."

Reading the passage from the judgment of Mellish, L. J., to which I have referred, together with what Bowen, L. J., said in the passage I last read, it does not appear to me that, as interpreted by Bowen, L. J., there is anything in the law as laid down in *Hext* v. *Gill* open to the criticism which was applied to it. The case of the *Earl of Jersey* v. *Neath Union* is a clear decision, if it were wanted, that *Hext* v. *Gill* is a binding authority, not only on me, but on the Court of Appeal; so also is the case of *Earl of Jersey* v. *Neath Union.*

Now the question is, what is the true meaning of the rule as laid down in *Hext* v. *Gill.* It cannot be that the test is whether the minerals can be worked at a market profit at the time. This is expressly shown by Bowen, L. J., not to be the meaning of the words of Mellish, L. J. Does it, then,

mean that the test is whether they are minerals in any other sense than this; are they substances otherwise falling under the definition of minerals which have "a use and a value of their own independent of and separable from the rest of the soil?" I understand the true rule to be this: You inquire what the substances are; and then you ask: Are these "minerals" in the sense that they form or belong to a class or kind of substances of which it can be said that when separated from the soil they are valuable either for the purpose of sale or for other purposes? Applying that test to a simple substance like coal, I ask myself, Is coal a mineral? Speaking generally, undoubtedly, apart from this particular test of value, one must say that coal is one of the most familiar examples of what is meant by minerals, not merely in a general sense, but in a grant of this description. It is one of the first things which is so regarded in a coal district. Am I to inquire whether the coal as it now exists beneath the soil can be got so as to be sold at a profit? I think not. I think it is a substance which has, when separated from the soil, a use and a value of its own independent of and separable from the rest of the soil; and that this is the proper test to apply. I think that is the fair result of the authorities; and that in this case, it being shown upon the evidence that the redrock is useful for building purposes, as to the redrock and as to the coal which have been referred to, although neither of these substances can be worked to a commercial profit at the present time, yet nevertheless they fall within the reservation, and that what the defendants have done and are threatening to do constitutes really a trespass on the property of the plaintiffs in the action. The result, therefore, is that the plaintiffs are entitled to an injunction restraining the defendants from trespassing on the mines and minerals mentioned in the lease.

Solicitors: W. F. FOSTER; WOODCOCK, RYLAND & PARKER.

T. C. POWER ET AL. v. JAMES SLA ET AL.

(24 Montana 243; 61 Pac. 468. Supreme Court. June 25, 1900.)

Equitable defenses as well as defenses at law may be interposed in ejectment, but in such case the answer must contain all the allegations necessary to warrant the relief sought.

Strangers cannot attack patent. After patent has passed to the entryman, mere strangers will not be heard to question the validity of the proceedings by which the patent was obtained; in such cases the government only can contest its validity.

The annual labor upon a mining claim may be made in labor or improvements on the claim itself or one one of a group of contiguous claims, or in instances upon adjoining ground not included in any claim.

The plea of forfeiture is one of confession and avoidance and admits a prior right in the plaintiff.

[1]**Essentials of such plea.** One who relies upon such plea must show the facts upon which he relies to overturn the prior right of plaintiff and establish also such right in himself.

He assumes the burden of proof and must make good his case by clear and convincing testimony.

Labor and improvements are not synonymous terms and the non-doing of one and the non-placing of the other must be both averred.

Allegations too general. The allegations of location and record are not sufficient when made in such general terms as to amount to mere conclusions of law.

Styling "counter claim" a "defense." The fact that a demurrer to an answer denominates it a "defense" instead of a "counter claim" will be regarded in the appellate court as immaterial, where both counsel and the trial court have treated it as attacking the pleading as a counter claim.

Stating cause of demurrer in language of code. Where a demurrer is interposed to a counter claim on the ground that it does not state facts sufficient to constitute a cause of action, this being a ground of demurrer under Code Civ. Proc. § 680, subd. 6, it is sufficient to state the objection in the language of that subdivision.

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[1]Whether a second party had a right to make a location over a prior location depends on whether the first forfeited his right by failure to do his annual labor—and the second party must plead as well as prove this forfeiture. *Bishop* v. *Baisley*, 28 Oreg. 119; 41 Pac. 936.

The failure to do the annual labor must be specially pleaded. *Renshaw* v. *Switzer*, 15 M. R. 345.

Appeal from District Court, Lewis and Clarke County; Henry N. Blake, Judge.

Action in ejectment, brought by T. C. Power and John B. Wilson against James Sla and Con. Kelly. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

STATEMENT OF THE CASE.

Action in ejectment involving the ownership and possession of the Clementh, Union Jack, and Blue Boy contiguous lode mining claims, situate in Lewis and Clarke county, and designated by the United States surveyor general at Helena as mineral surveys Nos. 1,743, 2,206, and 2,207.

The complaint states first a cause of action in the usual form, and then in a second count alleges grounds for equitable relief by way of injunction to prevent trespassing by defendants pending the litigation. The defendants join issue upon all the allegations except as to their hostile possession of the ground embraced in the Clementh lode mining claim. Of this they claim to be the beneficial owners. They then

Forfeiture when a material issue must be strictly proved. *Mt. Diablo Co.* v. *Callison*, 9 M. R. 617. *Colman* v. *Clements*, 5 M. R. 247. *Turner* v. *Sawyer*, 17 M. R. 683. *Strasberger* v. *Beecher*, 20 *Mont.* 143; 49 Pac. 740. *Providence Co.* v. *Burke*, 19 M. R. 625.

In *Trevaskis* v. *Peard*, 18 M. R. 353, plaintiff was allowed to show abandonment of defendant's claim without special plea. To same effect. *Bell* v. *Bed Rock Co.* 1 M. R. 45. *Willson* v. *Cleaveland*, 30 Cal. 192.

The annual labor act should be liberally construed. The work may be proven by any evidence which tends to establish it. Failure to file the affidavit does not preclude proof. The burden of proof is on the person alleging forfeiture, which must be strictly proven. *McCulloch* v. *Murphy*, 125 Fed. 147.

Burden of proof to show non-performance is upon the party alleging it. *Callahan* v. *James*, 141 Cal. 291; 74 Pac. 853.

Report of receiver allowed as proof. Cost of getting men to mine allowed. Measurement of work done no fair test where mine idle and ill equipped. *Whalen Co. v. Whalen*, 127 Fed. 611.

proceed to set up an equitable defense by way of "cross complaint," by which it is sought to have plaintiffs declared trustees of the legal title to the Clementh claim for the benefit of defendants, and to compel a transfer of this title to them by suitable conveyance. The facts upon which they seek this relief are alleged as follows:

1. "That on the 10th day of April, 1886, plaintiffs claimed to be in the actual occupation and possession of that certain quartz lode mining claim known and designated as the 'Clementh Quartz Lode Mining Claim,' situate in Ten Mile (unorganized) mining district in Lewis and Clarke county, under a location and record thereof theretofore claimed to be made, in accordance with the regulations of said district and the laws of the United States and of the said territory in such case made and provided by their grantors and predecessors in interest.

2. "That on the 10th day of April, 1886, the said plaintiffs made their application in the United States land office at Helena, in said territory, now state of Montana, for a patent for said premises, the same being designated 'Survey No. 1,743' and 'Mineral Application No. 1,662'; and that, notwithstanding said plaintiffs were so claiming to be in possession thereof, and entitled to the possession thereof, they failed and neglected to do and perform one hundred dollars' worth of work or labor thereon, or any work or labor thereon, during the years 1889, 1890, and 1891, on account whereof said mining claim became open for relocation in the same manner as if no location had ever been made of the same, and said application abandoned."

3. "That while the said premises were thus a part of the unoccupied and unappropriated lands of the United States, and open to relocation, and before the said plaintiffs, or their grantors, or the original locators thereof, or their successors in interest, had resumed work upon said premises, defendant James Sla and one R. Burridge, being then citizens of the

United States of America, on the 22nd day of July, 1892, entered upon and discovered upon said claim a vein or lode, bearing gold, silver, and lead, with two well-defined walls, and distinctly marked the boundaries of the said premises as a new location, under the name hereinafter mentioned; upon the ground, so that said boundaries could be readily traced, and did, on the 23d day of July, 1892, cause a record notice of their said location to be made, which contained the names of the locators, the date of the location, and such description of said claim by reference to permanent monuments as would and did identify the same, and which was designated and named the 'Minnehaha Lode Mining Claim,' and which is more particularly described as follows, to wit: 'That certain quartz lode mining claim designated as the "Minnehaha Lode Mining Claim," situate in Ten Mile (unorganized) mining district, Lewis and Clarke county, Montana, about six hundred feet east of Sand creek, and about three miles west of Ten Mile creek, and more particularly described as follows: Beginning at the discovery and running eighty-five feet southwest to post No. 1; thence running three hundred feet southeast to post No. 2; thence fifteen hundred feet in a northeast direction to post No. 3; thence six hundred feet north to post No. 4; thence fifteen hundred feet southwest to post No. 5; thence three hundred feet southeast to post No. 1, the place of beginning,'—on account whereof defendant James Sla and said R. Burridge became possessed and entitled to the possession thereof."

(4) "That said R. Burridge conveyed and transferred all of his right, title, and interest in said premises to defendant Con Kelly, and that ever since the location and recordation of said mining claim and the possession and right of possession thereof by said defendants and their predecessors in interest they have done and performed work and labor thereon required to be done and performed, in all respects complied with the regulations of said mining district and the laws of

the United States and the said state of Montana; and that, notwithstanding plaintiffs had forfeited their possession and right of possession of said premises as aforesaid, they did, by virtue of their said application and publication of notice theretofore given on the 11th day of April, 1886, and for sixty days thereafter, as by law required, and without any new application or notice, on the 25th day of November, 1892, enter and pay for said Clementh lode claim as aforesaid, being mineral entry No. 2,774, and on the 6th day of June, 1893, obtained a United States patent therefor, being patent No. 23,010, and which said premises are more particularly described in said patent, to which reference is made,—all of which said proceedings had on or before November 25, 1892, were without the knowledge, acquiescence, or consent of defendants or their predecessors in interest."

Then follow the additional allegations that defendants and their predecessors in interest have in all respects complied with the law so as to entitle them to a patent; that no notice of application for patent for plaintiffs was ever given after the Clementh lode had become subject to relocation; that the United States land department erroneously proceeded to issue patent to plaintiffs without notice to defendants or their predecessors, and without any hearing; that the rights of the defendants were never considered or passed upon by said land department that the plaintiffs and their predecessors in interest had full knowledge of the fact of the location of the property by defendants and their predecessors, and well knew that defendants claimed the same by virtue of their location aforesaid; that, so knowing of defendants' claims, they fraudulently proceeded to obtain patent for the said Clementh lode without the knowledge of defendants or their predecessors in interest; that the defendants and their predecessors in fact had no knowledge of plaintiffs' application; that the plaintiffs' patent was secretly obtained while defendants were in the actual, quiet, and peaceable occupation and possession of

the premises aforesaid and were entitled to the entire beneficial interest therein; that by reason of the erroneous issuance of the patent aforesaid to plaintiffs they have acquired an apparent legal title to said premises which, in equity and good conscience, belongs to defendants; that plaintiffs hold such title for the exclusive use and behoof of the defendants; that there are no claimants to said land, or any part thereof; that under the law applicable to mineral lands of the United States, after the expiration of the notice of the application for a patent by plaintiffs, the only mode of ascertaining whether or not the work and labor for the years 1889, 1890, and 1891 had been done and performed by the plaintiffs was by requiring them to give a new notice as if said application was an original one; that by mistake in the interpretation of the law and the principles applicable thereto the officers of the United States land department dispensed with the publication of such notice; that, if said notice had been given, the defendants would have been afforded an opportunity to interpose their adverse claim, and to fully and completely establish the validity of the same; and by reason of the interpretation so erroneously made of the law, and the mistake on the part of the officers of the land department in not requiring a republication of notice as aforesaid, the defendants were deprived of their opportunity of being heard.

Judgment is demanded that the plaintiffs be enjoined from the prosecution of their suit, that they be declared trustees of the legal title to the ground embraced by the Clementh lode for the use and benefit of defendants, and that they be directed to transfer the title to defendants by a suitable and proper conveyance.

To the "cross complaint" plaintiffs interposed a general demurrer, which was sustained. No amendment being made, a trial was had upon the issues made by the denials of the defendants, which resulted in a verdict and judgment for plaintiffs. Defendants appeal from the judgment.

E. W. TOOLE, for appellants.

WALSH & NEWMAN, for respondents.

BRANTLY, C. J., after stating the case, delivered the opinion of the court.

The only question presented upon this appeal arises upon the correctness of the action of the district court upon the demurrer. It is conceded by the appellants that the proceedings of the land department of the United States in the disposition of the public lands are judicial in their character, and that the determinations therein by the proper officers, acting within their jurisdiction, upon questions of fact, or of mixed law and fact, are conclusive upon the courts, and cannot be revised or disturbed by them. The contention is made, however, that the courts, while recognizing the dignity of a patent, from the government, may, nevertheless, through their equitable powers, control and limit its operation in accordance with the principles of common justice as between the grantee of the legal title under the patent and others who have the beneficial interest in the land conveyed; that section 2322 of the Revised Statutes of the United States secures to the locator of a mining claim valuable property rights which cannot be taken away by the government or by any person except by due process of law which affords reasonable notice and an opportunity to be heard; that when a valid relocation of a claim has been made after forfeiture of the original location pending a suspended application for patent by failure on the part of the applicant to do annual representation work pending the suspended proceedings, and before payment to the government by the applicant, the relocation wipes out the original location completely, and gives to the second locator all the rights conferred by the original location; and that if, after the relocation is completed, the first locator proceeds under his suspended appli-

cation to make payment, and thus secures a patent without publication of an additional notice, and without the knowledge of the second locator, a wrong is thus committed upon the second locator, which a court of equity will redress by holding the patentee a trustee for the second locator. This argument proceeds upon the assumption that it is incumbent upon the officers of the land department under these circumstances to require a new notice to be published when the proceedings for a patent are resumed, and that the failure in this particular on their part is such a mistaken application of the law to the facts of the case that a court of equity ought to intervene and correct the wrong thus done by decreeing the legal title to the rightful owner. This is upon the principle that one who wrongfully obtains the title to land which, in equity and good conscience, belongs to another—whether it be done in good faith or not—will be charged as trustee for the latter.

It is well settled that under our system equitable defenses, like the one sought to be invoked here, as well as defenses at law, may be interposed in actions in ejectment. In such cases, however, the answer is in the nature of an original bill in equity, and must contain all the allegations necessary to constitute the defense or warrant the relief sought. *Reece* v. *Roush,* 2 Mont. 586; *Lamme* v. *Dodson,* 4 Mont. 560, 2 Pac. 298. It must disclose a case which, if established by proof, would constitute a bar to plaintiff's case, and justify a decree granting appropriate affirmative relief to defendant, such as is demanded in this case. Assuming, for the purpose of this discussion, without deciding the question, that the law is as defendants assert it to be, and that this court would be warranted, in a proper case, in granting appropriate relief, the defendants do not disclose a case calling for its application. It is incumbent upon them to show such facts as that it will appear therefrom that they have connected themselves with the original source of title in the government, and that

their rights are injuriously affected by the existence of the patent. They must show such equities in themselves as will control the legal title in the plaintiffs' hands. *Foss* v. *Hinkell,* 78 Cal. 158, 20 Pac. 393; *Chapman* v. *Quinn,* 56 Cal. 266; *South End M. Co.* v. *Tinney,* 22 Nev. 19, 35 Pac. 89; *Hermocilla* v. *Hubbell,* 89 Cal. 5, 26 Pac. 611; *Boggs* v. *Mining Co.,* 14 Cal. 279; *Van Wyck* v. *Knevals,* 106 U. S. 360, 1 Sup. Ct. 336, 27 L. Ed. 201; *Ard* v. *Brandon,* 156 U. S. 537, 15 Sup. Ct. 406, 39 L. Ed. 523; *St. Louis Co.* v. *Kemp.,* 104 U. S. 636, 26 L. Ed. 875; *Moore* v. *Robbins,* 96 U. S. 530, 24 L. Ed. 848; *Steel* v. *Refining Co.,* 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; *Johnson* v. *Towsley,* 80 U. S. 72, 20 L. Ed. 485; *Sparks* v. *Pierce,* 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428; *Deffeback* v. *Hawke,* 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423. Making the statement in another form, the defendants stand in no attitude to question the title of plaintiffs unless by their allegations they present facts showing not only that at the time the patent was issued to plaintiffs they (plaintiffs) were not entitled to it by reason of their failure to perform the conditions required by law, but also that they themselves have performed all the conditions necessary to entitle them to demand a patent from the government. The rule is deduced from the cases cited that, after the patent has passed to the entryman, mere strangers will not be heard to question the validity of the proceedings by which the patent was obtained. In such cases the government only can contest its validity in proceedings properly brought to set it aside.

The defendants, in order to show their right to a patent, attempt to allege a forfeiture by the plaintiffs during the years 1889, 1890, and 1891, and a relocation of the ground covered by the Clementh lode by Sla and Burridge in 1892 under the name of the "Minnehaha Lode." Their averment in this connection is that "they [plaintiffs] failed and neglected to do and perform one hundred dollars' worth of work

or labor, or any work or labor, thereon during these years." The language of the statute (Rev. St. U. S. § 2324) is: "On each claim * * * not less than one hundred dollars' worth of labor shall be performed or improvements made during each year." It is the well-settled doctrine that the annual expenditure required by the foregoing provision may be made either in labor or improvements put upon the claim itself, or upon one of a group of contiguous claims to which the particular claim belongs, or, in some instances, upon adjoining ground not included in any claim. 2 Lindl. Mines, §§ 629-631; *St. Louis Sm. Co.* v. *Kemp, supra; Jackson* v. *Roby,* 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990; *Book* v. *Mining Co.* (C. C.) 58 Fed. 106; Rev. St. U. S. § 2324. The outlay is to be regarded as made upon the claim, within the meaning of the statute, whenever it is made for the development of the claim, and to facilitate the extraction of the minerals it may contain. *Smelting Co.* v. *Kemp, supra.*

The plea of forfeiture is in the nature of a confession and avoidance. It admits a prior right in the plaintiff, which would have continued but for the entry and location by the defendant, which, under the mining law, has terminated it. *Morenhaut* v. *Wilson,* 52 Cal. 263. One who relies upon such a plea must set forth the facts upon which he relies to overturn the prior right of his adversary, and establish them by clear and convincing proof. *Renshaw* v. *Switzer,* 6 Mont. 464, 13 Pac. 127; *Wulf* v. *Manuel,* 9 Mont. 286, 23 Pac. 723; *Mattingly* v. *Lewisohn,* 13 Mont. 508, 35 Pac. 111; *Strasburger* v. *Beecher,* 20 Mont. 143, 49 Pac. 740; *Hammer* v. *Garfield Co.,* 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964. He assumes the burden of pleading and proving that the prior owner has done none of the acts which, under the statute, he may do to preserve his right. The allegation quoted from the answer is not sufficient. True, it negatives the doing of any "work or labor" upon the Clementh claim during the years 1889, 1890, and 1891, and

this constructively excludes the idea that any expenditure was made in this way on any adjoining ground for the benefit of the claim; but the terms "work" and "labor" are not synonymous with the term "improvements." The former have reference to prospecting and excavating for the purpose of development; while the latter, though comprehensive enough to include everything signified by the former, has reference also to tangible, material additions to the claim in the way of machinery, buildings, and other structures put in place or erected for the purpose of developing the property and extracting minerals contained in it. Therefore, merely to negative in the pleading that $100 worth of labor has been done during the year, and to establish this by proof, be it ever so clear and convincing, is not sufficient to warrant a finding of a forfeiture. The pleading must also negative the second alternative, so as to admit proof showing a non-performance in that particular. The allegations of the answer are directed to the first alternative only. Under them, proof would not be admissible to show that plaintiffs did not, during the years named, put upon the surface of the claim, or upon adjoining ground, machinery, buildings, or other structures which were designed to be used and could be used for the purpose of aiding in the extraction of ores from the Clementh claim. In this respect, therefore, the statements in the answer are insufficient, and the demurrer was properly sustained.

The demurrer was also properly sustained on another ground, for not only was it incumbent upon defendants to properly plead and prove a forfeiture on the part of plaintiffs, but also to allege facts sufficient to show that they were themselves entitled to demand a patent from the government. They attempt to allege the facts showing their location of the Minnehaha lode, but fail in two particulars to show a valid location. The statute (Comp. St. Mont. 1887, div. 5, § 1477) provides:

"Any person or persons who shall hereafter discover any mining claim upon any vein or lode bearing gold, silver * * * or other valuable deposits, * * * shall, within twenty days thereafter, make and file for record in the office of the recorder of the county in which said discovery or location is made, a declaratory statement thereof, in writing, on oath made before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States."

It is nowhere alleged in the answer that the required declaration was ever made and filed with the recorder of Lewis and Clarke county or elsewhere. The allegation on this subject is that Sla and Burridge "did, on the 23d day of July, 1892, cause a record notice to be made." This statement is at best a conclusion, and, in the connection in which it is made, can be held to mean no more than that some sort of a notice in writing was made. It does not suggest that the notice was ever verified, or put upon record in the proper county. Nor is it aided in any respect by the subsequent averment that defendants have fully complied with the laws of the United States and the state of Montana, and are entitled to a patent. This is but a conclusion, and embodies no fact to supply the omissions made in the foregoing allegations. The answer, therefore, fails to show that defendants so connected themselves with the government that they may assert title in themselves at the time plaintiff's patent was issued, and that their rights have been injuriously affected by an erroneous application of the law by the officers of the land department. No matter what notice should have been given by these officers, the defendants do not disclose facts sufficient to show that they were other than strangers to the title, and cannot be heard to complain.

The defendants, in their reply brief, argue that the questions raised by the plaintiffs as to the sufficiency of the allegations contained in the affirmative answer should not be considered, because the demurrer denominates it a "defense" instead of a "counterclaim," and does not distinctly specify

objections to it, as required by section 715 of the Code of Civil Procedure. This part of the answer is in form and substance an equitable counterclaim, and not a defense. Bliss, Code Pl. § 349. It properly belongs to the class of counterclaims mentioned in section 714 of the Code of Civil Procedure, as distinguished from defenses and counterclaims mentioned in section 711, and should have been attacked accordingly. Both counsel and the trial court, however, treated the demurrer as an attack upon the pleading as a counterclaim instead of a defense. It is, therefore, of no moment in this court that the demurrer does not correctly name the pleading which it sought to attack.

Nor can counsel be sustained in the contention that the demurrer is insufficient in that it does not point out specific objections to the answer. Section 715, *supra,* provides that the demurrer to a counterclaim may specify the objections to it in the same way as when interposed to a complaint. Section 681 of the Code of Civil Procedure provides that, when the demurrer to a complaint is upon the ground mentioned in subdivision 6 of section 680, which enumerates the grounds of demurrer to a complaint, the objection may be stated in the language of that subdivision.

The judgment of the district court is affirmed.

Affirmed.

WORD, J., not having been a member of the court when this case was argued, took no part in the decision.

MANUFACTURERS' GAS & OIL CO. ET AL. v. INDIANA NATURAL GAS & OIL CO.

(155 Indiana 461; 57 N. E. 912. Supreme Court, June 28, 1900.)

Geology of the natural gas field of Indiana, stated with narration of the physical incidents of gas and its peculiar conditions necessitating application of special principles.

Natural gas does not become the absolute property of the owner of the land producing it until reduced to possession.

The state has the right by statute to regulate its production, and to prevent the exhaustion of the common reservoir and to prohibit any owner taking more than his proper share.

The statute forbidding the use of artificial pressure to induce a larger production from the common reservoir is not unconstitutional.

Injunctive relief. An owner of a gas well has the right to an injunction against the owner of another gas well to prohibit the use of forced pressure.

Appeal from Circuit Court, Grant County; H. J. Paulus, Judge.

The doctrine of the text case is the reverse of that held in Pennsylvania. *Jones* v. *Forest Oil Co.* 20 M. R. 350.

The use of forced pressure in transporting natural gas is not prohibited. *Manufacturers Co.* v. *Indiana Co.* 156 Ind. 679; 21 M. R. —.

Natural gas company held for damage from fire caused by its neglect to regulate its pressure. *Indiana Co.* v. *Long*, 27 Ind. App. 219; 59 N. E. 410.

That a gas company recognized as a public corporation cannot supply its present customers is no defense to mandamus to furnish gas to a party entitled to become a customer. *State* v. *Consumers Gas Co.* 157 Ind. 345; 61 N. E. 674.

Where a natural gas company accepts an ordinance fixing rates it is bound, though city has no power to enforce such ordinance. *Noblesville* v. *Noblesville Gas Co.* 157 Ind. 162; 60 N. E. 1032.

Natural gas is a mineral. *In re Buffalo Co.* 73 Fed. 191. *Ontario N. G. Co.* v. *Smart*, 19 Ont. 595. *Ontario Co.* v. *Gosfield*, 18 Ont. App. 626. Bryan on Petr. & N. G., 15.

Petroleum and gas are included under the word "Land." *Haskell* v. *Sutton*, 53 W. Va. 206; 44 S. E. 533.

Injunction by the Manufacturers' Gas & Oil Company and others against the Indiana Natural Gas & Oil Company. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

ROLLIN WARNER, A. W. BRADY and WM. A. KETCHAM, for appellants.

W. O. JOHNSON, M. WINFIELD, FOSTER DAVIS, J. C. BLACKLIDGE, C. C. SHIRLEY and CONRAD WOLF, for appellee.

DOWLING, J. In this suit the appellants sought to enjoin the appellee from using devices for pumping, and from employing any other artificial process or appliance for the purpose, or having the effect of, increasing the natural flow of gas from the wells of the appellee, or through the pipes conveying and transporting the same.

The ruling of the court sustaining a demurrer to the complaint is the error assigned.

The appellants, the Manufacturers' Gas & Oil Company, the Manufacturers' Fuel Company, the Ball Bros. Glass Manufacturing Company, the Swayzee Glass Company, the Crystal Window-Glass Company, and the Alexandria Window-Glass Company, are corporations organized under the laws of this state, as is also appellee, the Indiana Natural Gas & Oil Company. The complaint states that the two corporations first named are engaged, among other things, in supplying natural gas to manufacturing companies carrying on business at Muncie, Delaware county, Ind., in which large amounts of capital are invested, and by whom 1,600 men are employed and paid, the value of the annual output of which is $3,500,000; that the pipe lines of the said Manufacturers' Gas & Oil Company extend to, and some of its wells are situated at, a point about 9 miles northwest of the city of Muncie,

and 15 miles from one of the lines and from some of the wells of the appellee, in Grant county; that the pipe lines and some of the gas wells of the Manufacturers' Fuel Company extend north from the city of Muncie about 7 miles, to about 18 miles from the lines and wells of the appellee; that the Ball Bros. Glass Manufacturing Company has an annual output of $1,500,000, and that it employs 1,200 men, with a pay roll of $42,000 per month; that the lines through which it is supplied with gas extend north from the city of Muncie about 11 miles, to within a distance of about 18 miles of the lines and wells of the appellee. Similar allegations are made as to the Swayzee Glass Company, the Crystal Window-Glass Company, and the Alexandria Window-Glass Company. It is further stated that each of the said manufacturing establishments requires a large quantity of fuel to enable it to carry on its operations; that natural gas is more desirable than any other kind of fuel, and that the plants of said appellants were located and built especially with reference to the supply of natural gas in their vicinity, and are entirely dependent upon it. It is alleged that the appellee is engaged in the business of mining, collecting, and transporting natural gas from the natural gas fields in Indiana to the city of Chicago, in the state of Illinois, and that in the conduct of its said business it has established pipe lines for the transportation of natural gas through a great part of the counties of the state from Howard county to the northwest boundary of the state, and that for the purpose of transporting such natural gas it has established and is maintaining one pumping station in the county of Jasper, and one in the county of Howard, and that it is intending and threatening to, and, unless restrained by the court, it will, establish another, in the county of Grant, where it has located and drilled wells, and laid pipe lines connecting with its main pipe line to Chicago. That, underlying the counties in the northeastern and central part of Indiana, there was

discovered in the year 1886 a great reservoir of natural gas, located in the Trenton rock, at various distances from the surface of the earth, the counties of Delaware, Madison, and Grant being located over the center of said reservoir, and said reservoir extending in every direction from the three counties aforesaid, and underlying the whole of Blackford, and parts of Jay, Wells, Howard, Tipton, Hamilton, Hancock, Henry, and Randolph counties, the supply of gas being greatest in the counties of Delaware, Grant, and Madison; that said reservoir of natural gas is single, continuous, connected, and limited, situated in the Trenton rock underlying said several counties and parts of counties at a depth of from 900 to 1,000 feet below the surface of the earth; that the said Trenton rock is a porous substance, which permits the passage of natural gas through it; that said gas is confined in said rock at a great pressure, which has diminished from 325 pounds in 1886 to 165 pounds at the present time; that because the said reservoir is continuous, connected, and limited, any diminution, waste, destruction, or injury to any part of said reservoir decreases the entire supply of natural gas, and diminishes the pressure of all natural gas wells drawing from said reservoir, thereby injuring all other parts of said reservoir; that beneath and around said reservoir is a vast body of salt water, which also is confined and is subject to great pressure, and which, as the pressure on said reservoir of natural gas decreases or is diminished, constantly tends to enter the said reservoir and the wells drilled therein, and to destroy the same; that when the pressure within the said reservoir shall decrease to about 100 pounds the effect will be to permit said body of salt water to enter said entire reservoir and to destroy the same, with all the natural gas wells entering therein or drawing thereon; that the gas wells of the appellants will be rendered entirely useless and worthless if the said reservoir is destroyed; that for this reason it is of the utmost importance to the appellants and to all other

manufacturing institutions in said gas districts that no excessive, unauthorized, or unlawful use of said natural gas be made or permitted; that the appellee has located and drilled, and draws natural gas from a great number of natural gas wells in Grant and Howard counties, and has leased many thousand of acres of land in said Grant and Delaware counties, whereon it has not yet drilled wells, but it expects, intends, and gives out that it will drill gas wells on said lands; that much of the land so leased for the purposes aforesaid lies in the immediate vicinity of the said wells owned by the appellants, respectively; that all of said wells already drilled by the appellee penetrate to and draw from said reservoir of natural gas, and all wells hereafter drilled upon said leased land will penetrate and draw upon the said reservoir; that the appellee, in violation of the rights of the appellants, and in violation of section 2 of an act entitled "An act to regulate the mode of procuring, transporting, and using natural gas, and declaring an emergency," which became a law by lapse of time, without the governor's approval, March 4, 1891, has used, is using, and threatens to continue to use artificial processes or appliances for the purpose, and which have the effect of increasing the natural flow of the natural gas from its wells, through the pipes used for conveying and transporting the same, by maintaining and using at points in the counties of Jasper, Howard, and Grant, pumping stations, and other devices to the appellants unknown, by which the natural gas while being transported is forced into the mains and pipes at a pressure of 400 pounds to the square inch, and largely beyond the natural rock pressure of the natural gas at the wells; that by the use of such devices the back pressure upon the reservoir, which is essential to keep the salt water from entering the wells and destroying the natural gas, is withdrawn, and the flow of gas from the wells and in the pipes is greatly increased, and the supply and pressure of gas in the reservoir

greatly diminished, to the prejudice of the appellants and of all other manufacturing interests in and throughout the district; that in so forcing the gas through such pipe lines by such artificial processes the appellee has drawn and is continuing to draw so heavily through its said wells upon the said reservoir as to seriously diminish the supply and pressure of gas therein, and to draw from the wells owned by the appellants and other manufacturers in said district the supply of gas upon which they are dependent for their continued operation; that unless the appellee is restrained from piping said natural gas by pumping and other artificial appliances for the purpose and having the effect of increasing the natural flow of gas from any well, and of increasing and maintaining the flow of natural gas through the pipes used for conveying and transporting the same, the appellants and all other manufacturing interests located in the said gas districts will suffer irreparable injury, their said wells will be wholly destroyed and rendered entirely worthless, the value of their property will be destroyed in whole or in part, and they will be compelled to close down and discharge their employés until such time as they can refit and re-establish their plants for the use of coal; and that even then the value of their property will be greatly diminished, etc.

The relief demanded is that the appellee be perpetually enjoined and restrained from using devices for pumping, or any other artificial process or appliance for the purpose, or that shall have the effect, of increasing the natural flow of natural gas from any of its wells, and from increasing and maintaining the flow of natural gas through the pipes used for conveying and transporting the same.

The sufficiency of the complaint and the right of the appellants to an injunction are denied by the appellee, and the grounds relied upon by appellants for relief are vigorously assailed.

Counsel for appellee contend: (1) That while natural

gas in the ground may not be susceptible of absolute private ownership, or the subject of ordinary property rights, yet, when brought to the surface and placed in pipes for transportation, it becomes private property and an article of commerce; that all rights in, to, and over it, as such property, are entitled to the same measure of protection as is granted to the owner of oil, coal, or wheat on the cars; and that the state has then no right to prohibit or restrict its use, sale, or transportation. (2) That the supreme court of this state having recognized natural gas, when brought to the surface of the earth and placed in pipes, as private property and a commercial commodity, and the appellee having invested its means upon the faith of those decisions, the appellants are precluded by the doctrine of *stare decisis* from the relief they seek, even if those decisions should now be regarded as erroneous and overruled. (3) That if the acts of 1889 and 1891 should be held valid, and the former decisions construing them overruled, a court of equity cannot now grant relief by way of injunction, because of laches on the part of the appellants. (4) That the appellants show no such individual interest or dominant right in the natural gas while in the ground, nor any such special injury different from the injury to the public, as will authorize them to maintain this action. (5) That the appellants do not show clearly their right in the *res*, that such right has been invaded or is threatened, and that their right is dominant and superior to that of the appellee. And (6) that under the acts of the legislature which have been held valid, and under the decisions of the supreme court of this state in reference to the act which was held invalid, it has been settled that gas, when mined, is the property of the person producing it, and that the legislature cannot prohibit its sale or purchase within or beyond the state.

Whatever pertinence and force the first, second, third, and sixth objections, and the arguments founded upon them,

might have if the grievance complained of was the transportation and sale of natural gas beyond the state by the appellee, they cannot be regarded as important or influential in the present case, for the reason that such transportation and sale are not the grounds of the action. The wrongful act stated and sought to be enjoined is the use by the appellee of pumping machinery and other appliances for the purpose and having the effect of increasing the flow of gas from its wells into its pipes. The question to be determined here is not whether natural gas, when reduced to possession, is property, but as to the right of well owners to use certain extraordinary means to reduce it to possession.

In the examination of the subject, it is proper and necessary to consider whether the appellants have or can have a property interest in natural gas while in the earth, and before it is reduced to possession; whether the appellants will sustain a special injury by the threatened acts of the appellee,—different from the injury to the public; and whether the acts of the appellee invade an equitable right of the appellants.

Natural gas is a fluid mineral substance, subterraneous in its origin and location, possessing in a restricted degree the properties of underground waters, and resembling water in some of its habits. Unlike water, it is not generally distributed, and, so far as now understood, it can be used for but few purposes; the most important being that of fuel. Its physical occurrence is in limited quantities only, within circumscribed areas of greater or less extent.

If it could be dealt with as subterranean waters, there would be little difficulty in determining the rules by which the rights of landowners and other persons interested in it should be governed. But the difference between natural gas and underground waters, whether flowing in channels or percolating the earth, is so marked that the principles which the courts apply to questions relating to the latter are not

adapted to the adjustment of the difficulties arising from conflicting interests in this new and peculiar fluid.

Natural gas, being confined within limited territorial areas, and being accessible only by means of wells or openings upon the lands underneath which it exists, is not the subject of public rights in the same sense or to the same extent as animals *ferœ naturæ* and the like are said to be. Without the consent of the owner of the land, the public cannot appropriate it, use it, or enjoy any benefit whatever from it. This power of the owner of the land to exclude the public from its use and enjoyment plainly distinguishes it from all other things with which it has been compared, in the use, enjoyment, and control of which the public has the right to participate, and tends to impress upon it, even when in the ground in its natural state (at least, in a qualified degree), one of the characteristics or attributes of private property. In the case of animals *ferœ naturæ*, fish, and the like, this public interest is said to be represented by the sovereign or state. So, in the case of navigable rivers and public highways, the state, in behalf of the public, has the right to protect them from injury, misuse, or destruction. But in the case of natural gas there are reasons why the right to protect it from entire destruction while in the ground should be exercised by the owners of the land who are interested in the common reservoir. From the necessity of the case, this right ought to reside somewhere, and we are of the opinion that it is held, and may be exercised, by the owners of the land, as well as by the state. Natural gas in the ground is so far the subject of property rights in the owners of the superincumbent lands, that while each of them has the right to bore or mine for it on his own land, and to use such portion of it as, when left to the natural laws of flowage, may rise in the wells of such owner and into his pipes, no one of the owners of such lands has the right, without the consent of all the other owners, to induce an unnatural flow into or through

his own wells, or to do any act with reference to the common reservoir, and the body of gas therein, injurious to, or calculated to destroy, it. In the case of lakes or flowing streams, it cannot be said that any particular part or quantity or proportion of the water in them belongs to any particular land or riparian owner; each having an equal right to take what reasonable quantity he will for his own use. But the limitation is upon the manner of taking. So, in the case of natural gas, the manner of taking must be reasonable, and not injurious to or destructive of the common source from which the gas is drawn. The right of each owner to take the gas from the common reservoir is recognized by the law, but this right is rendered valueless if one well owner may so exercise his right as to destroy the reservoir, or to change its condition in such manner that the gas will no longer exist there.

This view of the law is sustained by the recent decision of the supreme court of the United States in the case of *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729. In that opinion the court say: "Although, in virtue of his proprietorship, the owner of the surface may bore wells for the purpose of extracting natural gas and oil, until these substances are actually reduced by him to possession he has no title whatever to them as owner; that is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. It is also clear from the Indiana cases cited that, in the absence of regulation by law, every owner of the surface within a gas field may prosecute his efforts, and may reduce to possession all or every part, if possible, of the deposits, without violating the rights of the other surface owners.

"If the analogy between animals *ferœ naturæ* and mineral deposits of oil and gas, stated by the Pennsylvania court and adopted by the Indiana court, instead of simply establishing

a similarity of relation, proved the identity of the two things, there would be an end of the case. This follows because things which are *feræ naturæ* belong to the 'negative community,'—in other words, are public things, subject to the absolute control of the state, which, although it allows them to be reduced to possession, may, at its will, not only regulate, but wholly forbid, their future taking. *Geer* v. *Connecticut,* 161 U. S. 519, 525, 16 Sup. Ct. 600, 40 L. Ed. 793. But, whilst there is an analogy between animals *feræ naturæ* and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of some one else within the gas field; it being true as to both animals *feræ naturæ* and gas and oil, therefore, that, whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *feræ naturæ* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No devesting of private property, under such a condition, can be conceived, be-

cause the public are the owners, and the enacting by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character. *Geer* v. *Connecticut, supra.* On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them, without a taking of private property. But there is a co-equal right in them all to take from a common source of supply the two substances which, in the nature of things, are united, though separate. It follows from the essence of their right, and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right, and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *feræ naturæ*, which, it is unquestioned, the legislature has the authority to forbid all from taking, in order to prevent them from undue destruction, so that the right of the common owners, the public, to reduce to possession may be ultimately efficaciously enjoyed. Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the state of Indiana which is here attacked because it is asserted that it devested private property without due compensation, in substance, is a statute protecting private property, and preventing it from being

taken by one of the common owners without regard to the enjoyment of the others. Indeed, the entire argument upon which the attack on the statute must depend involves a dilemma which is this: If the right of the collective owners of the surface to take from the common fund, and thus reduce a portion of it to possession, does not create a property interest in the common fund, then the statute does not provide for the taking of private property without compensation. If, on the other hand, there be, as a consequence of the right of the surface owners to reduce to possession, a right of property in them in and to the substances contained in the common reservoir of supply, then, as a necessary result of the right of property, its indivisible quality, and the peculiar position of the things to which it relates, there must arise the legislative power to protect the right of property from destruction. To illustrate by another form of statement, the argument is this: There is property in the surface owners in the gas and oil held in the natural reservoir. Their right to take cannot be regulated without devesting them of their property without adequate compensation, in violation of the fourteenth amendment; and this although it be that, if regulation cannot be exerted, one property owner may deprive all the others of their rights, since his act in so doing will be *damnum absque injuria*. This is but to say that one common owner may devest all the others of their rights without wrong-doing, but the lawmaking power cannot protect all the owners in their enjoyment without violating the constitution of the United States. * * *

"In view of the fact that regulations of natural deposits of oil and gas, and the right of the owner to take them, as an incident of title in fee to the surface of the earth, as said by the supreme court of Indiana, is ultimately but a regulation of real property, they must hence be treated as relating to the preservation and protection of rights of an essentially

local character. Considering this fact, and the peculiar situation of the substances, as well as the character of the rights of the surface owners, we cannot say that the statute amounts to a taking of private property, when it is but a regulation by the state of Indiana of a subject which especially comes within its lawful authority."

The surface proprietors have the right to reduce to possession the gas found beneath. They could not be absolutely deprived of this right without a taking of private property. But there is a co-equal right in all of such owners to take the gas from the common source of supply. The use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of others. From these considerations, the supreme court of the United States held that the legislature derived the power to protect all the collective owners, by securing a joint distribution, to arise from the enjoyment by them of their privilege to reduce to possession. It declares the act of 1893 to be a statute protecting private property, and preventing it from being taken by one of the common owners without regard to the enjoyment of the others. A right of property in all the surface owners in the gas contained in the common reservoir of supply is recognized, as is also the constitutional legislative authority to protect the right of property from destruction. The final conclusion of the court is that one common owner of the gas in the common reservoir cannot devest all the others of their rights, without wrongdoing.

The acts of 1891 and 1893 are an express recognition by the legislature of the qualified ownership of the common owners in the gas in the common reservoir, and any act therein forbidden may be, according to the circumstances, the subject of a suit at law or a proceeding in equity by the person in-

jured, as well as the foundation of a public prosecution. Independently, however, of any statute, for the reason already stated, the common owners of the gas in the common reservoir, separately or together, have the right to enjoin any and all acts of another owner which will materially injure, or which will involve the destruction of, the property in the common fund, or supply of gas. Acts 1893, p. 300; *State* v. *Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809; *Del Monte M. & M. Co.* v. *Last Chance M. & M. Co.*, 171 U. S. 60, 18 Sup. Ct. 895, 43 L. Ed. 72; *Brown* v. *Spilman*, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304; *Jamieson* v. *Oil Co.*, 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; *Townsend* v. *State*, 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294; Acts 1891, p. 89; *Hibberd* v. *Slack* (C. C.) 84 Fed. 579. There is something in the nature of unity in their possession of the gas in the reservoir. 2 Bl. Comm. 182.

It is charged in the complaint that the appellee is using in two wells owned by it, and threatens to use in others, pumping machinery and other devices by which the natural flow of the gas is greatly increased, and that the effect of the use of such machinery and devices is to remove the back pressure by which the gas is confined in the Trenton rock, and a vast body of salt water, lying underneath and surrounding the reservoir, is prevented from rushing into the reservoir and destroying it, and putting an entire stop to the flow of natural gas therein. Certainly such acts are destructive of the common interests in the gas and reservoir, and the threatened injury is a proper subject of relief by injunction.

It does not appear from the complaint that there has been unreasonable delay on the part of the appellants in seeking relief, and it is clearly shown that they have a special interest in the gas in the ground, and a right to protect it from injury or destruction by the methods and appliances proposed to be used by the appellee in removing it from the

common reservoir into its pipes. The facts stated in the complaint constitute a cause of action, and the demurrer to it should have been overruled.

Judgment reversed, with instructions to overrule the demurrer, and for further proceedings in accordance with this opinion.

OTAHEITE GOLD & SILVER MINING & MILLING CO. v. DEAN.

(102 Federal 929. U. S. Circuit Court, District of Nevada. July 2, 1900.)

[1]**Respective duties of upper and lower mills.** The upper mill must recognize the rights of mills below and impound its tailings or otherwise prevent their injurious flow to mills below, and the lower mill must stand the consequences of such slight injury as the upper cannot prevent.

The maxim sic utere tuo applies to this class of contentions.

Facts of the case. Injunction denied. In making preparation to start up a mill for the reduction of gold and silver ores, which had been idle for a number of years, plaintiff found the water at the settling tank, from which the supply of water for operating the mill was obtained, contained a quantity of tailings, and that after being cleaned out the tailings and debris from above came into the tank in such quantities as might, if continued, prevent the mill from being run. Thereupon plaintiff demanded of defendant, who was operating a mill above the plaintiff's on the same creek, that he prevent his tailings from polluting the water, and was given assurance that by the time he got ready to start up this would be done. At the time this suit was commenced defendant was not discharging tailings or sediment into the stream sufficiently to interfere with plaintiff's using its waters for his mill, and had constructed a series of reservoirs by which he impounded the tailings, and prevented any injurious matter flowing from his mill into the creek. *Held*, that plaintiff was not entitled to an injunction restraining defendant from polluting the stream.

No forced construction of equity pleadings. Future Injuries. Defendant's denial in his answer in such case "that he threatened or threatens or intends to dump any tailings or debris from his mill into said stream or water of said creek," does not entitle plaintiff to an injunction against the pollution of the waters of the creek by defendant, on the grounds that the injunction cannot injure defendant under such circumstances, and that plaintiff is entitled to protection against defendant's pollution of such waters in the future.

Action for deposit of tailings on stream bank below. Stream pollution. *Columbus Co.* v. *Tucker*, 48 Oh. St. 41; 26 N. E. 630.

Subsequent mining appropriator of water, liable for injuring irrigation water below, by tailings. *Montana Co.* v. *Gehring*, 75 Fed. 385.

D. S. TRUMAN, for plaintiff.

EDWARD J. MCCUTCHEN, HENRY MAYENBAUM, and TORREYSON & SUMMERFIELD, for defendant.

HAWLEY, District Judge (orally). This is a suit in equity to obtain a decree enjoining and restraining the defendant from "in any manner using, wasting, obstructing, hindering, delaying, or preventing" the waters of Lewis creek, in Lander county, Nev., from running to, into, upon, and across the lands of complainant, "and to and into the complainant's mill," or from diverting from their usual or natural channel and course any portion of the same, or "from

Defendants held for deposit of coal dirt on stream bank. *Hindson* v. *Markle*, 171 Pa. 138; 33 Atl. 74.

Custom to dump does not justify injury to water owners. *Suffolk Co.* v. *San Miguel Co.* 9 Colo. App. 407; 48 Pac. 828.

Injunction against killing fish, obstructing roads, flowing lands and noxious odors. *Threatt v. Brewer Co.* 49 S. C. 95; 26 S. E. 970.

Salt miner enjoined from salting water of running stream. *Strobel* v. *Kerr Co.* 164 N. Y. 303; 21 M. R. —.

Injunction against pollution with coal dirt. Measure of damages for injury to water. *Keppel* v. *Lehigh Co.* 200 Pa. 649; 21 M. R. —. See also *Stevenson* v. *Ebervale Co.* 201 Pa. 112; 50 Atl. 818.

Defendant allowed to build impounding dam to prevent the deposit. *York* v. *Davidson*, 39 Oreg. 81; 21 M. R. —.

An upper riparian proprietor may use the stream for mining purposes and to a certain extent impair its purity, but he may not so pollute it as to render it unfit for domestic use. *Tennessee Co.* v. *Hamilton*, 100 Ala. 252; 14 So. 167. *Drake* v. *Lady Ensley Co.* 102 Ala. 501; 14 So. 749.

Measure of damages in such cases. *Lentz* v. *Carnegie*, 145 Pa. 612; 23 Atl. 219.

Construction of pleading in action for conversion of tailings holding complaint to allege sufficient title and to give proper description. *Stanley* v. *Sierra Nevada M. Co.* 118 Fed. 931.

The word "tailings" by use of the parties construed to include slag. *Butte Co.* v. *Montana Co.* 121 Fed. 524.

A deposit if on public land will be protected against attempt to locate as a placer claim. *Ritter* v. *Lynch*, 123 Fed. 930.

polluting the same." The pleadings herein are voluminous, presenting many issues upon which much testimony was offered. The entire case is, in several of its features, exceedingly interesting, and in many respects important. Great latitude was allowed both parties in the introduction of their testimony.

In my opinion, the case must stand or fall upon an issue of fact concerning the tailings, and the reference made to other issues will be simply for the purpose of giving a more intelligent and better understanding, not only of the facts, but also of the contention of counsel and of the circumstances surrounding the case. As a general rule, it may be said that, where there are two mills in operation on the same stream, the lower proprietor may be compelled to take some steps and be at more expense than he would if he were the only proprietor on the stream, and that it becomes the duty of the upper proprietor to use great care and caution, and to take such action as will avoid, as far as possible, within the bounds of reason, any injury occurring to the lower proprietor by the flow of tailings from his mill. It is, among other things, alleged in the complaint:

"The said defendant, as aforesaid, is carrying on the business of mining and milling of ores, rock, and earth of gold, silver, and other metals at a point in said Lewis cañon higher up said stream and water course herein mentioned as Lewis creek, and, in so carrying on and conducting the milling of his said ores, uses the waters of said Lewis creek in so operating said mill; that, by the process of working said ores in use by this defendant, all of the refuse of the ores so worked by said defendant in the operation of his mill becomes what is known as 'tailings,' which, as the ore aforesaid, after being crushed, pulverized, and roasted, and chemically treated, to extract the metals therefrom, and after such extraction of said metals therefrom, said tailings are allowed and permitted by this defendant to escape to and into the waters of said Lewis creek at a point above the lands and mill of this plaintiff; that, by reason of the said acts of this defendant, the waters of said stream, and the whole thereof, become and are so polluted and contaminated and impregnated with said tailings that the same cannot be used by this plaintiff in its

mill boilers for making steam wherewith to run its machinery, or in the working or reduction of its ores, at all, to the great and irreparable injury and damage of plaintiff, and to such an extent that, if permitted to continue upon the part of the defendant, the business of milling ores of this plaintiff will be greatly impaired or wholly destroyed."

The defendant in his answer admits:

"That he is carrying on the business of mining and milling ores, rock, and earth of gold and silver in said Lewis cañon, and he alleges that he uses the water of the westerly branch of the eastern fork of said creek situated in Pittsburg mining district, in said county and state, on the mountain, at or near the head of said Lewis cañon, which said branch is fed by the water of springs in said mountain, and which said branch and springs are herein designated as the 'Dean Branch and Springs.' The said defendant denies that by any process of working ores by said defendant, all or any refuse of ores worked by him in the operation of his mill, or otherwise, or of any tailings or debris thereof, are by him allowed or permitted to escape to or into the waters of said creek, and into the said alleged lands, mill, or premises of said plaintiff. The said defendant denies that, by reason of any act or acts of this defendant, the waters of said stream, or any part thereof, running into said alleged lands, mill, and premises, become or are in any wise polluted or contaminated or impregnated with any tailings, or that the same cannot be used by plaintiff in its alleged mill boilers for making steam wherewith to run its alleged machinery, or in the working or reduction of its alleged ores, to the great or irreparable or any injury or damage of plaintiff, or to such an or any extent that, if permitted to continue the alleged business of milling ores by plaintiff, will be greatly or at all impaired, or wholly or partially or at all destroyed. The said defendant denies that he threatened or threatens or intends to dump any tailings or debris from his mill into said stream or water of said creek, to flow into or upon said land or mill or premises of said plaintiff, or to divert said waters of said stream other than the waters of said Dean branch and springs, and denies that the using of said water of said Dean branch and springs by said defendant does in any wise diminish the quantity of water in said creek that would flow on said land, mill, and premises, or either thereof, of said plaintiff, if the water of said Dean branch and springs were not used by said defendant. * * * And defendant denies that the use by the defendant of the water of said Dean branch and springs in any wise affects the water of said creek for the uses or purposes for which the said plaintiff claims the same in its said bill of complaint."

There are other allegations of the complaint which were evidently drawn upon the theory that the plaintiff was entitled to all the waters of the stream, and to deny the right of defendant to divert any water therefrom for any purpose. These averments were denied in the answer. The testimony shows that, prior to the commencement of this suit, Mr. Thorp, the president and secretary and principal stockholder of plaintiff, visited San Francisco, Cal., and called upon the defendant for the purpose of adjusting the difficulties concerning the water. Upon this point Mr. Thorp testified: "I wanted him, if he would, to impound the tailings, and do it properly, and I would give him a lease for a dollar a year." Upon the refusal on the part of defendant to accept such a lease, this suit was commenced.

The evidence clearly and satisfactorily shows that defendant had a legal right, by appropriation and beneficial use, to the water to the extent required to enable him to properly run and operate his mill. The fact is that both parties are entitled to the waters of the stream for operating their respective mills. This right must be exercised with reference to the general condition of the country and the necessities of both parties, and not so as to deprive the other of its reasonable use. Water in this state is too scarce and valuable, and the necessity of its use in milling, crushing, and reducing gold and silver ores too great, to allow either an upper or lower proprietor, in a case like this, to absorb it all, or to pursue such a course or contend for any doctrine that would prevent its reasonable use by the other, provided it can be used by both, by ordinary care and caution, and without unusual expense, serious detriment, or material injury to either.

It may not be an easy task to define with such clearness as to make it applicable to all cases the rights of mine and mill owners, situated in cañons and ravines through which streams of water flow, who are occupied in extracting the

ore from their mines, crushing and reducing the same in their mills, and producing the precious metals therefrom; especially as to the rights of the upper and lower proprietors on the stream, where both parties have an equal right, under the law, to the use of the water of the stream. Perhaps the safest rule would be to cling with pertinacity to the old and oft-repeated maxim, "*Sic utere tuo ut alienum non lædas,*" and hold that such property rights are always subject to it. One thing is certain,—that its application in the present case would preserve the rights of both plaintiff and defendant, and work no injury to either. The defendant in operating his mill is therefore bound to so use the water appropriated by him for that purpose as not to interfere with the rights of the plaintiff in operating its mill by discharging into the stream tailings, debris, or other deleterious matter in quantity or quality which would, to any material extent, injuriously affect the rights of the plaintiff to the water necessary for the purpose of operating its mill.

It is not absolutely essential that water should be perfectly clear and pure in order that it may be used for ordinary milling purposes. If it were, but few mills could be operated, especially on the banks of the mountain streams like the one in question; for the natural flow of the water over a sandy or loose soil would gather up more or less sediment, while, in the case of heavy freshets, which occur every spring, from the melting of snow in the mountains, rocks, tailings, sand, and other débris will cause more or less inconvenience, detriment, and injury to every quartz-mill owner, whether there are any mills above him or not. No injunction could be broad enough or strong enough to prevent such injury. Equity does not require the water to be sent away from a mill as pure and unadulterated as it was when it left the springs or creek before being used in the mill.

The plaintiff's mill (Highland Chief) is situate about three miles below the defendant's mill. It appears that as

early as 1882 there were several mining companies working different mining claims in that locality, in which Mr. Thorp, the president of plaintiff, was interested as an owner or stockholder, and that mills known as the "Highland Chief" and "Eagle" were erected for the purpose of crushing ores from these mines; that the mills were operated for a few weeks in 1882, when they were closed down, and remained idle until 1886, when they were started up and operated in the crushing of ore for a few weeks, and were then again closed down, and, for various causes, remained idle until the summer of 1897; that the plaintiff was incorporated in 1888. The plaintiff failed in its efforts to connect itself by title from the original owners, but did show that it was in possession of the Highland Chief Mill, and some of the other property referred to as having been worked, owned, and operated in 1882 and 1886, under claim of title. The complaint in this suit was filed in the state court July 21, 1897, before the Highland Chief commenced crushing ore in that year.

The testimony on behalf of the plaintiff is, in substance, to the effect that in making preparations, in the spring of 1897, to start up the Highland Chief Mill, the water at the settling tank, above the mill, from which the plaintiff derived its supply of water for the purpose of operating its mill, was found to contain a large quantity of tailings, and, after being cleaned out, the tailings and debris from above came into the tank in such quantities as might, if continued, prevent the mill from being run; that the debris and tailings were of such a character, and came in such quantities, as would be liable to choke up the pipe, and, even if the water flowed to the mill in that condition, its effect would be to form a scale which might cause the boilers at the mill to be burned; that the boilers would be liable to explode; and that it would probably require 50 per cent more fuel to get up steam. Mr. George, who was then in the employ

of plaintiff, in charge of its property, testified that he went up to defendant's mill, and saw Mr. Bousfield, the superintendent of the Dean Mill, and told him "that we thought of starting up down there, and that the tailings were coming down, and asked him if he could do anything to prevent it; and I told him, if they would pipe from the tank house up to the big tree, I thought it would be about 1,500 feet; that we could get clear water for the mill at the lower place, and the tailings would not bother us, and it would not be a great expense. He said, 'Well, you will not be ready to start up until June or after, and by that time the tailings will not be running down there.' He said, 'It will cost over $1,000 to do that work, and it is too great an expense.' That was about the amount of the conversation we had." Thereafter he served upon Mr. Bousfield the following notice:

"Lewis, June 5, 1897.

"W. E. Dean, per J. D. Bousfield, Agent—Dear Sir: You will take notice that I am ready to make use of the waters of Lewis creek, but, owing to the tailings from your mill in said water, am unable to do so. You will therefore prevent said tailings from polluting said water immediately, or I shall have to take the necessary steps to compel you to do so.

"S. B. Thorp,
"Per E. T. George."

This notice was served more than a month prior to the time when Mr. Thorp visited San Francisco.

On behalf of defendant it was shown that the Dean Mill was erected in 1892, and had been continuously operated since that time, except when stopped, for very short periods, by the inclemency of the weather or inability to obtain men to work; that after the water was used for running the mill it flowed out from the mill, and the tailings were deposited in a reservoir, which would approximately contain about 2,500 tons of tailings; that after the liquid material passed from this main reservoir it went into a second reservoir,

capable of holding 100,000 gallons of water; that it passed into a third reservoir, of sufficient size and capacity to settle 50,000 gallons of water, and then passed into a fourth reservoir, which had a capacity of settling 200,000 gallons of water, and from that reservoir the water flowed down into Lewis creek in a practically clear and pure condition, so that it could be used for any purpose, and would not in any manner interfere with the proper working, running, and operating of plaintiff's mill; that the second and third reservoirs were constructed in May or June, 1897, and completed before the bringing of this suit, and the fourth was commenced in July or August, 1897, but not fully completed until after this suit was brought. The Highland Chief Mill was started up in the latter part of July or 1st of August, 1897, and ran a few weeks in August, and again during the months of October and November, and was closed down the last of November, not on account of any difficulty with, or interference from, the tailings in the creek, but from other causes.

From the entire testimony, I find the established facts to be (1) that at the time this suit was commenced the defendant was not discharging tailings or sediment from his mill into the stream to such an extent as to interfere with the use by the plaintiff in its mill of the water flowing down the natural channel of Lewis creek; (2) that the defendant, after using the water from the Dean branch and springs in his quartz mill by means of reservoirs built and constructed by him for that purpose, impounded the tailings so that the waters from said stream when they left the defendant's premises were reasonably fit for use in the plaintiff's mill; (3) that the means used by the defendant to impound the tailings from his mill are ample and sufficient to prevent any injurious matter flowing from his mill into the creek.

There is always more or less light substances, deleterious in their nature, carried in suspension, flowing with the water, which only settles, if at all, when deposited in the settling

tank or cribs, and then only where the water is comparatively still. Annoyance from this source cannot be avoided.

There was a conflict in the testimony as to whether or not the character of tailings testified to by Mr. George was, in quality or extent, such as would materially interfere with the running of plaintiff's mill. It is unnecessary to discuss this question or to decide it. There was a mass of testimony introduced by defendant as to the various causes which had produced the deposit of tailings in the creek below the works of defendant, and above the plaintiff's mill. Among other things, it was shown that several years ago a dam or reservoir had been erected on the banks of the creek for the purpose of saving the tailings from the old Pittsburg mill; that at different times a portion of the waters of the creek flowed over said reservoir, carrying more or less sediment and tailings directly into Lewis creek; that in 1895 or thereabouts a cyanide plant was constructed by the Nevada Reduction Company, and was operated at different times during the years 1895 and 1896, for the purpose of working the tailings; that in the spring of 1897 the reservoir or dam of said company broke, and a great quantity of tailings from the same was carried down the stream, and deposited above the settling tank from which the plaintiff obtained the water for use in its mill.

It is claimed that the accumulation of the tailings in plaintiff's settling tank can only be accounted for on the theory that the debris and tailings must have come from the defendant's mill, because there were no other parties at that time at work on the stream above the plaintiff's mill. The testimony, when carefully weighed and considered, does not, in my opinion, sustain this theory. There is no positive evidence that the flow of tailings or sediment from the defendant's mill at that time contributed to any appreciable extent to the accumulations of the tailings found in the plaintiff's settling tank.

The plaintiff claims that the defendant, in his answer, having denied "that he threatened or threatens or intends to dump any tailings or debris from his mill into said stream or water of said creek, to flow into or upon said land or mill or premises of said plaintiff," the court ought to grant the injunction prayed for herein, because by so doing the defendant would not in any manner be injured, and because the plaintiff is entitled to be protected, and ought not to be compelled to bring another suit, in the event that the defendant should at any time in the future allow any tailings or debris from his mill and reservoirs to flow into the creek so as to result in injury and damage to the plaintiff. This contention cannot be sustained, under the evidence in this case. It is well settled that a court of equity may grant or withhold its aid according to the particular facts and circumstances of each case. This being true, it naturally follows that its intervention ought not to be procured except by the presentation of a substantial case, where there is a clear and palpable violation of a right. Wherever it affirmatively appears that the plaintiff has been injured or damaged in his rights by the wrongful acts of the defendant, an injunction should be issued. Where some degree of injury has been shown, the court would, naturally, have the right to consider the probability of its continuance, and many cases might be found where it has been held that, if the injury seems likely to continue, the court may grant an injunction. If there was any satisfactory evidence that defendant had permitted the mud, sand, sediment, or tailings to flow down the stream from his mill in such quantities as to injure the plaintiff in the operation of its mill, and had taken no steps or precaution to prevent such flow, and claimed the right to continue so to do, this court would not hesitate to grant the injunction, although the injury to plaintiff was very slight, if there was a reasonable probability of its continuance or increase. But no authority has been cited which would justify this court in

issuing an injunction in a case like this, where no injury has been occasioned, and no reasonable probability that any will occur, on the bare ground that some time in the future the defendant might change his mind, and do some act which might result in an injury to the plaintiff. Let a decree be entered in accordance with this opinion, denying the injunction.

OLIVE LAND & DEVELOPMENT CO. v. OLMSTEAD ET AL.

(103 Federal 568. U. S. Circuit Court, Southern District California. July 9, 1900.)

Location of oil land without discovery void. The location as an oil placer mining claim of public lands upon which no discovery of oil had been made vests the locator with no rights in such lands as against the United States, or as against one subsequently acquiring the title thereto or rights therein from the United States by any legal means prior to any such discovery.

Discovery of mineral after lawful entry. One entering public lands, who has paid the purchase price, or performed all the conditions requisite to entitle him to a patent therefor, is vested with the equitable title, and his right to the patent can only be defeated by a finding by the land department that he was not qualified to acquire the title, or that the land was not subject to his entry, and the character of the land is to be determined by the facts as known to exist at the date of such entry. His rights cannot be affected by any subsequent discovery of mineral, or any other fact which would take the land out of the class in which it stood when the entry was made.

Private lands included in forestry reservation. Selection by owner of other lands. Under the provision of act, June 4, 1897 (30 Stat. 11, 35, 36), relating to forestry reservations, which give the owner of, or bona fide settler on, a tract of land which may be included within the limits of a public forestry reservation, the right to relinquish the same and select in lieu thereof a tract of vacant land open to settlement, not exceeding that relinquished in area, where a patentee of such a tract relinquishes the same, and selects in lieu thereof a tract which appears by the books of the land office to be vacant and open to settlement, and files his selection in the land office, he becomes at once the equitable owner of the land so selected;

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[1] *Migeon* v. *Montana Ry.* 18 M. R. 446. *U. S.* v. *Blackburn*, 18 M. R. 684.

A discovery justifying further exploration makes the land mineral. *Castle* v. *Womble*, 19 L. D. 455.

Must be of greater value for mineral than for agricultural purposes. *Hunt* v. *Steese*, 75 Cal. 621; 17 Pac. 920.

Contest between oil land and forest claimant on land prospectively valuable for oil. Land is not vacant when being bored for oil, though oil not yet discovered. *Cosmos Co.* v. *Gray Eagle Co.*, 112 Fed. 4; 21 M. R. —.

and his right to a patent therefor is not affected by the fact that it it situated in the vicinity of producing oil wells, and that it has surface indications of oil, or that it was selected with a view of its possible value as oil land, where no discovery of oil has ever been made thereon.

[1]**Land to be reserved as mineral** must not only be known to contain mineral but that mineral must have been known to be valuable.

Sinking for oil enjoined by entry man. One acquiring the equitable title to land by selecting the same under such act in lieu of land which he held by patent and surrendered to the government may, prior to the issuance to him of a patent therefor, maintain a suit in equity to enjoin a defendant from sinking oil wells thereon and taking oil therefrom.

In Equity. Suit to quiet title, and to enjoin trespasses on land claimed by complainant under an entry from the United States, but to which no patent had been issued. On motion for preliminary injunction, demurrer to bill, and motion by complainant for judgment on the pleadings.

EDWIN A. MESERVE and SHIRLEY C. WARD, for complainant.

M. W. CONKLING, for defendants.

Ross, Circuit Judge, The act of congress of June 4, 1897, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," contains, among other things, various provisions in respect to forest reservations, commencing with the declaration that:

"No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the pur-

[1] For cases defining "mining claim," "mining ground," etc., see *Johnson* v. *California Co.* 20 M. R. 314.

pose of securing favorable conditions of water flows and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein or for agricultural purposes than for forest purposes,"—and including this provision: "That in cases in which a tract covered by an unperfected bona fide claim, or by a patent, is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected; provided further, that in case of unperfected claims, the requirements of the laws respecting settlement, residence, improvements and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims." 30 Stat. 11, 35, 36.

The present is a suit in equity to quiet the complainant's alleged title to lots 1 and 5 of the fractional N. W. ¼ of section 4, township 4 N., range 18 W., San Bernardino base and meridian, situated in Ventura county, Cal., alleged to have been acquired by the complainant's predecessor in interest, one J. R. Johnston, who is alleged to have selected the land under the above provisions of the act of June 4, 1897, in exchange for patented land within a forest reserve surrendered by said Johnston to the government. The bill includes a prayer for an injunction enjoining the defendants from the commission of their alleged unlawful threatened acts of entering upon the lands in controversy and boring for and extracting any oil that may be found therein. Upon reading the bill an order was made requiring the defendants to show cause why an injunction should not be granted as prayed for by the complainant, and why the temporary restraining order granted by the court should not be continued pending the litigation. In response to the order to show cause the defendants appeared and filed a demurrer to the bill, as also a verified answer thereto. The complainant,

claiming that the answer raised no material issue of fact, moved for judgment on the pleadings, which motion was, by the stipulation of counsel for the respective parties, heard with the demurrer and the order to show cause. From the pleadings it appears that on the 20th day of January, 1900, Johnston was the owner in fee simple, free of any lien or incumbrance, of lot 2 in section 5 of township 4 N., range 15 W., San Bernardino base and meridian, situated in Los Angeles county, Cal., and within the limits of a public forest reservation, containing 36.81 acres, which land was then and still is a non-mineral tract, covered by patent issued by the United States; that on the 22d day of May, 1900, lot 1 of the fractional N. W. ¼ of section 4, township 4 N., range 18 W., S. B. M., containing 26.40 acres, and lot 5 of the fractional N. W. ¼ of said section 4, containing 10.41 acres, aggregating 36.81 acres, were, and for more than one year continuously theretofore had been, surveyed, unappropriated, and (unless otherwise shown by facts hereinafter stated) vacant public land of the United States, returned and characterized upon the official records of the United States as non-mineral land, free and open to entry and settlement under the laws of the United States, and did not then and does not now contain any known mines, salines, or minerals, petroleum, or mineral oil; that on January 20, 1900, Johnston, desiring to avail himself of the benefits of the above-mentioned act of congress, relinquished and conveyed the two tracts of which he was so the owner to the United States, and recorded the deed in the office of the recorder of the county in which the lands are situated, and on the 22d of May, 1900, filed with the register and receiver of the United States land office at Los Angeles, Cal., the said deed so recorded, together with his selection in lieu thereof of the two tracts first herein described, together with a full, true, and correct abstract of his title to the relinquished lands, duly certified as such by the county recorder

of the county in which the lands are situated, showing him to be such owner in fee simple, free of any lien or incumbrance, immediately prior to the time the deed to the United States was made and recorded; that on the said 22d day of May, 1900, the register and receiver of the land office accepted, received, and filed the application of Johnston, and duly entered the same upon the official records of the land office, and the register thereof did then and there certify that the land so selected was free from conflict, and that there was no adverse filing, entry, or claim thereto; and that on the next day, to wit, May 23, 1900, Johnston, by an instrument in writing, sold and conveyed all his right, title, and interest in the selected land to the complainant. The facts thus alleged by the complainant are not denied by the answer of the defendants, except as hereinafter stated, although the legal conclusions alleged by the complainant to flow from them are denied. The answer avers that the land in controversy is of no agricultural value, and of but little, if any, value for grazing purposes, and has no appreciable value for any purpose except for petroleum that may be obtained by boring or drilling therein; that it is in a well-recognized petroleum-producing belt, and that adjacent properties in the belt are actually producing petroleum in large and profitable quantities, and that the surface indications of such producing lands and upon the lands in controversy are the same; that the surface rock and sand and the surface geological formation and stratification upon the lands in controversy are such as would lead any experienced petroleum expert or any practical geologist familiar with petroleum-bearing lands in California to pronounce the same oil or petroleum territory, and chiefly valuable therefor; that one of the most pronounced and well-marked anticlinal folds of sandstone and shale formation in Ventura county runs through the land in controversy and has its apex thereon, and that where said anticlinal fold is most exposed, by a declivity which sharply

cuts the same, bituminous sand several feet in thickness and 100 or more feet long is clearly visible, which sand, when excavated, gives out a distinct odor of petroleum; that such bituminous sand, in the formation in which it is found, shows the land in controversy to be mineral or petroleum in character, and constitutes such a discovery as would justify any prudent petroleum miner in locating the same as petroleum land, and in spending his time and money in developing the same for its petroleum product; that in October, 1899, discovery of bituminous sand in said sandstone and shale formation having been made upon the land in controversy by eight persons, then citizens of the United States, and over the age of 21 years, they did then and there locate the fractional N. W. ¼ of said section 4, including the lands in controversy, as placer petroleum lands and as a placer petroleum mining claim, under the name of "La Bonita Oil Claim," pursuant to the laws of the United States, and did then and there clearly mark and define the boundaries thereof by substantial monuments, so that the corners might be readily found and the boundaries readily traced upon the ground; that thereafter, and prior to May 22, 1900, the said locators, by a written instrument, duly conveyed all their interest in the said mining claim to the defendants to this suit, by virtue of which they allege that they are now the owners of the lands in controversy, and entitled to their exclusive use and possession, and entitled to excavate and to bore and drill thereon for petroleum, and to take therefrom, when found, any petroleum that may be obtained. The answer also alleges that Johnston did not select the lands in controversy for their agricultural or grazing value, or for any purpose, except to obtain thereby the undiscovered petroleum that might be found therein, of all of which the complainant had knowledge, and that the selection by Johnston under the act of congress referred to, for the purpose stated, was fraudulent and in violation of the spirit and purpose of

the act of congress under which he pretended to proceed. The defendants assert, both in their answer and in argument, that no title vests under a selection of forest reserve lieu land until patent therefor issues, or until approval of the selection by the commissioner of the general land office, and that until such time such selected land is open to mineral discovery and mineral development, and that, if such discovery and development show the land to be more valuable for mineral than agricultural purposes, the attempted selection fails. It is also contended on the part of the defendants that the land in controversy was mineral when selected by the predecessor of the complainant, and therefore not subject to selection under the provisions of the act of congress above referred to; and this, because of its alleged surface indications and of the character of the adjacent land, and because of the alleged opinions that oil experts would express respecting it. The complainant controverts the position of the defendants in respect to the character of the land in question at the time of the location under which the defendants claim and since, and further insists that a selection of land under the act of congress of June 4, 1897, in lieu of patented land surrendered to the government, operates *eo instanti* to vest the full and complete equitable title in the selector, provided the land selected was at the time of selection "vacant and open to settlement," and that no subsequent discovery of mineral thereon can impair such title, nor alter the legal character of the land; and, further, that all public lands returned as agricultural are "vacant and open to settlement" whenever they are unappropriated on the books of the local land office, and contain no known salines or mines or producing oil wells, although they may contain some mineral, and be included within a mining location that would be valid as between rival mineral claims.

The great importance that the oil industry has already assumed in this state, the enormous value of oil-producing

lands, and the consequent avidity with which they are sought, coupled with the fact that the present suit will serve as a precedent for others now pending, has induced the court to take the case up out of its order, and to give to the questions presented careful consideration, to the end that the law upon the subject may be speedily settled, and the way indicated by which the title to such lands may be acquired, and the important industry referred to encouraged and developed. In the case of *Gird* v. *Oil Co.* (C. C.) 60 Fed. 531, 532, this court pointed out that the government title to oil-bearing lands can only be acquired, under existing laws, pursuant to the provisions of the mining laws relating to placer claims. And in the very recent case of *Nevada-Sierra Oil Co.* v. *Home Oil Co.* (C. C.) 98 Fed. 673, it was here decided, as it had been many times before by other courts, as well as by the land department of the United States, that mere indications, however strong, are not sufficient to answer the requirements of the statute of the United States relating to placer as well as lode claims, which requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim. That decision seems to have occasioned surprise among those seeking to acquire from the government lands supposed to contain oil although it was, as was shown in the opinion delivered at the time, in strict accord with the provisions of the statute, and is abundantly supported by the authorities. *Davis* v. *Weibbold,* 139 U. S. 507, 522, 11 Sup. Ct. 628, 35 L. Ed. 238; *Dughi* v. *Harkins,* 2 Land Dec. Dep. Int. 721; *Cleghorn* v. *Bird,* 4 Land Dec. Dep. Int. 478; *Commissioners* v. *Alexander,* 5 Land Dec. Dep. Int. 126; and numerous cases cited in *Davis* v. *Weibbold.* It is a matter of common knowledge that, in consequence of the decision in the case of *Nevada-Sierra Oil Co.* v. *Home Oil Co.,* strenuous efforts were made by strong and influential organizations to

induce congress at its last session to dispense with the necessity of an actual discovery of oil as a basis of acquiring such lands under the placer mining laws, and to provide that certain indications of the existence of such mineral should be sufficient evidence of the mineral character of the land; but all of these efforts were unsuccessful, and the law remains the same in that respect as before. Applying the law to the facts as made to appear by the pleadings in the present case, it is clear that the location of the lands in controversy by the predecessors in interest of the defendants in October, 1899, under the statute relating to placer claims, amounted to nothing, for the reason that no discovery of oil or other mineral had then been made, nor, indeed, has yet been made, in or upon any part of the lands in controversy. It is not pretended that the defendants or their predecessors remained in the actual possession of any part of the premises; and, if they had, the law is well settled that mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from them. Neither the defendants nor their predecessors in interest had made such a location as prevented the lands from being, in law, vacant. Others had the right to enter upon the lands for the purpose of taking them up under the mining laws, if it could be done peaceably and without force, or to acquire the government title thereto by any other legal means. *Sparks* v. *Pierce,* 115 U. S. 408, 413, 6 Sup. Ct. 102, 29 L. Ed. 428; *Belk* v. *Meagher,* 104 U. S. 279, 287, 26 L. Ed. 735; *Garthe* v. *Hart,* 73 Cal. 541, 15 Pac. 93; *Horswell* v. *Ruiz,* 67 Cal. 111, 7 Pac. 197; *McCormick* v. *Varnes,* 2 Utah 355; *Hopkins* v. *Noyes,* 4 Mont. 550, 2 Pac. 280. The real question in the case, therefore, is whether the proceedings taken under the act of congress of June 4, 1897, by the predecessor in interest of the complainant, conferred upon him and

his grantee such a right in the lands in controversy as will enable the complainant to maintain its bill.

The statute in question is a plain standing offer on the part of the government to exchange any of its land that is vacant and open to settlement for a like quantity of similar land within a forest reservation, for which it had previously issued a patent, or to which an unperfected bona fide claim had been acquired, provided that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims; the owner of or settler on the tract within the reservation, in the event of his acceptance of the offer, being required to relinquish his tract to the government, in consideration of which he is given the right to select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his patent or claim, as the case may be, with the further provision that no charge shall be made for making the entry of record, or issuing the patent to cover the tract selected. From these provisions it is clear that, in such cases of exchange, title is to be given by the government for title received, and in cases of unperfected claims the claimant is to occupy a precisely similar status in respect to the tract selected that he did regarding that relinquished. In all cases the land authorized to be selected in lieu of that relinquished is required to be vacant and open to settlement. When? Manifestly, at the date of selection. It is upon its then character and condition that the selector has the right, and is bound, to act. Before making his selection he must inform himself of the character and condition of the tract desired, but it would be wholly unreasonable to say that he is required to make a selection based upon what may be disclosed in that regard in the future. The right to select is by the statute given to the party invited by

the government to make the exchange, without other condition than that the land selected shall be vacant and open to settlement. Neither the act of the selector, however, in making the selection, nor that of the officers of the local land office, upon whose books the selected tract appears to be vacant and open to settlement, in accepting and filing the selection, is conclusive of the then character and condition of the land. Presumptively, the character and condition of the selected tract is such as is indicated by the books of the land office, and therefore, the selection, with the approval of the officers of the local land office, of a tract appearing upon the books as vacant and open to settlement, in lieu of a similar tract of like dimensions relinquished to the government, gives an equity in the selector which entitles him to protection until the fact in respect to the character and condition of the selected lands is, upon proper notice to the equity claimant, otherwise determined by the land department. The right to make that inquiry extends to the time of the issuance of the patent contemplated and provided for by the statute. *Hawley* v. *Diller* (decided May 28, 1900), 178 U. S. 476, 20 Sup. Ct. 986, Adv. S. U. S. 986, 44 L. Ed. —; *Lumber Co.* v. *Rust,* 168 U. S. 589, 593, 18 Sup. Ct. 208, 42 L. Ed. 591; *Knight* v. *Association,* 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974. But this inquiry, as has been said, is limited to the character and condition of the land at the time of its selection. One reason for this has already been stated, namely, that, while the selector under the act in question may and must inform himself in regard to the then character and condition of the land he desires to take in exchange for that relinquished, it would be altogether unreasonable to hold that he is required to make a selection based upon what may be disclosed in that regard in the future. And, turning to the act under consideration, it is seen, as has already been observed, that the power to "select" is by the statute given to the party who is invited to make

the exchange, provided always that he confines his selection to the class of lands described in the statute, to wit, those vacant and open to settlement. No other condition is imposed by the statute. The act in question differs very materially in this respect from the indemnity clauses of many of the railroad and other grants, requiring the selections to be made by and with the advice, consent, direction, or approval of some officer of the land department, in which case such consent or approval is deemed a condition precedent to the vesting of any interest in the selected land. The present case is quite similar to that of *Culver* v. *Uthe*, 133 U. S. 655, 10 Sup. Ct. 415, 33 L. Ed. 776, the facts of which were that one Uthe had a patent from the United States for the land there in controversy, dated February 10, 1851, which purported on its face to be issued under the act of congress of February 11, 1847 (9 Stat. 123), on a military land warrant that he had deposited in the general land office. This land warrant was located on the land then in question at the land office of the United States in Chicago, Ill., on July 10, 1850, under the authority of Uthe himself; and the land-warrant certificate was delivered up, and the patent aforesaid issued to him in due time, and after the proper course of proceedings. The defendant to the action relied upon the fact that the land was swamp land, within the meaning of the act of congress of the 28th of September, 1850 (9 Stat. 519); that by that statute the title to the land was transferred to the state of Illinois between the time of the location of the military land warrant and the issuance of the patent for it to Uthe, and that therefore the title claimed under Uthe failed, being vested by that statute in the state of Illinois,—the act being a grant *in præsenti*, and taking effect at its date. The supreme court said:

"Under an act of congress which authorized it to be done, Uthe, by directing his land warrant to be located upon this land and delivering up the warrant, and by the proceedings of the land office

upon that location, which resulted in issuing a patent to him for the land, had acquired an equitable title to the land, or what may be called a vested interest in it, prior to the passage of the swamp land act by congress. He had done what by the act of congress of 1847 (9 Stat. 123), entitled him to the land on which his warrant was located. He had delivered up the land warrant,—the evidence of his claim against the government. He had received in exchange for it the certificate of the receiver and register of the land office, and these entitled him to a patent after such delay as was necessary to ascertain the fact that the land had been granted to no one else, and that all his proceedings were regular, which facts were to be determined by the commissioner of the general land office, and which were determined in his favor. He had paid for this land. He had paid by the delivering up and cancellation of his land warrant. He had received the certificate of the register and receiver of the land office at Chicago, which, by the laws of nearly all of the Western states, have been made equivalent to the title to the land in action of ejectment, though the strict legal title remained in the United States at the date of the passage of the swamp land act. Are we to suppose that congress intended to give to the state of Illinois the land which it had already, by a contract for which value was received, promised to convey to Uthe? As the grant to the states of the swamp land within their jurisdiction was a gratuity, although accompanied with a trust for the reclamation of said land, it is not easily to be supposed that congress intended to be thus generous at the expense of parties who had vested rights in any of the lands so donated, derived from the United States."

It is true that in the case just cited a certificate had been issued by the register and receiver of the local land office in lieu of the land warrant surrendered, while here nothing more was done by the register and receiver of the local land office than to receive the deed for the relinquished land, together with the certificate of title thereto, and to accept and file the selection of the tract selected in lieu thereof. But in the present case nothing more was required to be done. The statute makes no provision for the issuance of any certificate by the register and receiver to the selector, or for the issuance to him of any other instrument than a patent. It is well settled that in purchases of land from the government, where one has paid the full purchase price and done all that

he is called upon to do by the terms of the statute, he has acquired an equitable title to the property bought. In *Benson M. & S. Co.* v. *Alta M. & S. Co.*, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762, it was sought to defeat the title of a mining claimant to his mine, after he had paid the complete purchase price therefor and received a certificate of purchase, by showing that he had not complied with the terms of the United States statute which requires that not less than $100 worth of labor be performed or improvements made each year "until a patent has been issued therefor." The supreme court, in denying the soundness of the proposition, said:

"It is a general rule in respect to the sales of real estate that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real-estate law has been repeatedly applied by this court to the administration of the affairs of the land department of the government; and the ruling has been uniform that whenever, in cash sales, the price has been paid, or in other cases, all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government, in trust for the other party, in whom are vested all the rights and obligations of ownership."

To the same effect are *Simonds* v. *Wagner*, 101 U. S. 261, 25 L. Ed. 910; *U. S.* v. *Hughes*, 11 How. 568, 13 L. Ed. 809; *Wirth* v. *Branson*, 98 U. S. 118, 25 L. Ed. 86; *Deffeback* v. *Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423; *Colorado C. & I. Co.* v. *U. S.*, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182; *Davis* v. *Weibbold*, 139 U. S. 524, 11 Sup. Ct. 628, 35 L. Ed. 238. *In Re Jack*, 7 Land Dec. Dep. Int. 570, and *Rea* v. *Stephenson*, 15 Land Dec. Dep. Int. 37, it was held that when a homesteader has completed his entry and made final proof, and final certificate has issued, a subsequent mineral discovery cannot affect his title, and a hearing regarding the same will not be ordered. In *Reid*

v. *Lavalle*, 26 Land Dec. Dep. Int. 100, it was said by the secretary:

"The only questions properly before the land office in this proceeding are those which relate to the actual known character of the land in controversy at the date of cash entry No. 269. If the land was then known to be valuable chiefly for its mineral contents, it was not subject to such entry. * * * The defendant's representations could not relieve the land department of its duty to determine the actual known character of the land at the date of the cash entry. * * * If the land was not mineral in character when Lavelle made his cash entry therefor, and if he is shown to have possessed the necessary qualifications, and to have fully complied with the homestead laws up to that time, his entry must stand."

So in respect to school lands. Under the school-land grant from congress it has been many times held that, unless they contain known mineral at the date of the survey, title thereto passes to the state, and subsequent discovery of mineral in profitable quantities could not devest the state of its title. *Saunders* v. *Mining Co.*, 125 Cal. 159, 57 Pac. 656; *Ivanhoe M. Co.* v. *Keystone M. Co.*, 102 U. S. 175, 26 L. Ed. 126; *In re Miner*, 9 Land Dec. Dep. Int. 408; *Barringer & A. Mines & M.* 527. See, also, *Shaw* v. *Kellogg*, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. Ed. 1052. And in respect to state lieu selections the law is settled that the rights of the parties claiming them are to be determined by the facts as known to exist at the date of the selection. *McCreery* v. *Haskell*, 119 U. S. 327, 7 Sup. Ct. 176, 30 L. Ed. 408; *Howell* v. *Slauson*, 83 Cal. 546, 23 Pac. 692; *Milling Co.* v. *Morgan*, 106 Cal. 416, 39 Pac. 802. In *Wirth* v. *Branson*, 98 U. S. 118, 25 L. Ed. 86, the supreme court declared:

"A party who has complied with all the terms and conditions which entitle him to a patent for a particular tract of land acquires a vested interest therein, and is to be regarded as the equitable owner thereof while his entry or location remains in full force and effect."

See, also, *Whitney* v. *Morrow*, 112 U. S. 695, 5 Sup. Ct.

333, 28 L. Ed. 871; *Edwards* v. *Elliot,* 21 Wall. 539, 22 L. Ed. 488; *Cornelius* v. *Kessel,* 128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482, in which latter case the court said:

"The power of supervision possessed by the commissioner of the general land office over the acts of the register and receiver of the local land offices in the disposition of the public lands undoubtedly authorizes him to correct and annul entries of land allowed by them where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property, and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other legally acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

The decisions of the land department are to the same effect. See *In re Abercrombie,* 6 Land Dec. Dep. Int. 693; *Harnish* v. *Wallace,* 13 Land Dec. Dep. Int. 108; *In re Miner,* 9 Land Dec. Dep. Int. 408; *In re Laney,* Id. 83; *In re Plymouth Lode,* 12 Land Dec. Dep. Int. 513.

As has been said, the question that remains open to inquiry by the land department up to the issuance of patent is whether or not the selected land was vacant and open to settlement at the time of its selection. Vacant public lands are open to settlement under the laws relating to that subject when they contain no "known salines or mines" (Act Sept. 4, 1841; 5 Stat. 455; Rev. St. § 2258), whether of gold, silver, petroleum, or any other mineral. The law as to what consti-

tutes a "known mine," under the statutes relating to the settlement of public lands, is also thoroughly well established. In the case of *Deffeback* v. *Hawke,* 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423, the legislation on the subject was reviewed at length. It was there held that no title from the United States to land known at the time of sale to be valuable for its minerals, of gold, silver, cinnabar, or copper, can be obtained under the pre-emption or homestead laws, or the town-site laws, or in any other way than as prescibed by the laws especially authorizing the sale of such lands, except in the states of Michigan, Wisconsin, Minnesota, Missouri, and Kansas. The court say (page 404, 115 U. S., page 100, 6 Sup. Ct., and page 426, 29 L. Ed.):

"We say 'land known at the time to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral,' in the sense of the statute, is applicable. * * * We also say lands 'known' at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of minerals may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after patent has been issued, to contain valuable minerals. Indeed, this has often happened. We therefore use the term 'known' to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."

In the case of *Colorado C. & I. Co.* v. *U. S.,* 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182, one of the grounds on which the government sought to annul the patents, was that the lands there in controversy, which turned out to contain large and valuable deposits of coal, were not subject to settlement and sale under the pre-emption laws; being "known mines," within the meaning of those laws. The court held

that it is not sufficient to constitute "known mines" of coal, within the meaning of the statute, that there should merely be indications of coal beds or coal fields of greater or less extent, and of greater or less value, as shown by outcroppings. Referring to the act of July 1, 1864 (13 Stat. 343), by which it was declared:

"That where any tracts embracing coal beds or coal fields, constituting portions of the public domain, and which as 'mines' are excluded from the pre-emption act of 1841 (5 Stat. 455), and which under past legislation are not liable to ordinary private entry, it shall and may be lawful for the president to cause such tracts, in suitable legal subdivisions, to be offered at public sale to the highest bidder, after public notice of not less than three months, at a minimum price of twenty dollars per acre; and any lands not thus disposed of shall thereafter be liable to private entry at said minimum,"—the court said: "We hold, therefore, that to constitute the exemption contemplated by the pre-emption act, under the head of 'known mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine under the conditions existing at the time than for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be, under any conditions, sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual 'known mines' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act cannot be successfully assailed."

See, also, *Davis* v. *Weibbold,* 139 U. S. 524, 11 Sup. Ct. 628, 35 L. Ed. 238; *Railroad Co.* v. *Valentine,* 11 Land Dec. Dep. Int. 238.

Nor is it of any importance, in view of the provisions of the statute under consideration, that the selection here in question may have been made in the hope of finding oil in

the land. The statute conferring the right of selection does not make that right in any way depend upon the intent with which it is made. *Mining Co.* v. *Reynolds,* 124 U. S. 374, 8 Sup. Ct. 598, 31 L. Ed. 466; *Sullivan* v. *Mining Co.,* 143 U. S. 431, 12 Sup. Ct. 555, 36 L. Ed. 214. Should doubt exist as to the character of any of the public lands standing upon the books of the local land offices as open to settlement, to which no valid right has attached, it is undoubtedly within the power of the officers of the general land office to withdraw them from settlement or sale pending an inquiry as to their true character. And such action, it is understood, has recently been taken by the land department in respect to some of the public lands in California, whose surface indications and the character of adjacent lands tended to show that they are oil lands. Lands so withdrawn are, of course, not open to settlement, and therefore not subject to selection under the act of June 4, 1897, in lieu of any land relinquished to the United States. But they continue open to exploration for minerals, and, when mineral is found therein, to location under the mining laws, if the land be at the time unappropriated. And even where such discovery is made subsequent to a prior location, if the location be otherwise valid, that fact is held to be immaterial, provided always that no rights of others have intervened before compliance by the locator with all of the statutory requirements. *Nevada-Sierra Oil Co.* v. *Home Oil Co., supra,* and cases there cited.

The case as presented showing that the complainant has an equity in the land in controversy which may ripen into a perfect legal title, it is entitled to the interposition of a court of equity to protect that right as against trespassers who confessedly threaten to enter thereon and to despoil the property of its chief, if not its only, value. In the case of *Railroad Co.* v. *Hussey,* 15 U. S. App. 391, 9 C. C. A. 463, 61 Fed. 231, there was a grant to the railroad company by

congress of certain alternate odd-numbered sections of public land, not mineral, to distinguish which from lands retained by the government a survey was essential; and in its absence the defendant, Hussey, without any right, entered within the grant limits and proceeded to cut down, destroy, and carry away a large amount of timber standing and growing upon what, when surveyed, would be odd-numbered sections, as well as what would, upon survey, prove to be even-numbered sections, of the lands within the grant limits. One of the contentions on the part of the railroad company in that case was that prior to the survey the railroad company and the government occupied the position of tenants in common of all the land situated within the grant limits. While denying the correctness of that position, the circuit court of appeals for this circuit said:

"But, because it cannot be properly held that the complainant and the United States are, prior to its survey, tenants in common of the entire body of land within the limits of the grant to the railroad company, does it necessarily follow that a trespasser may with impunity go upon the lands and cut down and destroy or carry away the timber growing upon them? The bill shows that the lands in question are valuable only for the timber that grows upon them. To cut down, destroy, or carry away the timber thereon is therefore, essentially, to destroy and take away the very substance of the estate. That an injunction will be awarded, in behalf of one showing the necessary interest in the property, to prevent such waste and destruction, is thoroughly settled. *Erhardt* v. *Boaro*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116. It is apparent that the complainant has no adequate remedy at law. It cannot maintain an action for damages for the cutting of any tree or trees upon the lands in question, or any other action at law, for the reason that it would be essential to the maintenance of such an action for the plaintiff to show that the particular tree or trees for the cutting of which damages were claimed, or other relief was asked, came from the land of the plaintiff; and this, as has been seen, is impossible to be shown in advance of the government survey. Yet the bill shows that the defendant, without any right or authority whatever,—in other words, as a mere trespasser,—has entered upon the body of unsurveyed lands within the limits of the grant to the complainant, and for purposes of speculation and sale has commenced to cut down the

timber thereon, and to manufacture the same into saw logs, lumber, etc., and has so cut 850,000 feet of saw logs, and will, unless restrained, continue those illegal acts, and thus remove the very thing which constitutes the chief, if not the only, value of the lands. Every tree already felled by the defendant, and every tree intended to be cut by him, in the prosecution of his undertaking, necessarily impairs the value of the complainant's interest in its grant; for the condition of the lands within the grant limits necessarily renders it uncertain and impossible to ascertain how many of such trees have been or will be cut from the lands belonging to the complainant. This very uncertainty would seem to vest in such grantees the right to protect the whole as against a mere trespasser and wrong-doer. * * * The bill in the present case alleges that the acts complained of are committed by the defendant upon what, when surveyed, will be odd-numbered sections, as well as what will be even-numbered sections, of the lands within the grant limits. The case is a novel one, it must be admitted; but where so great a wrong is being perpetrated, as must be taken to be true for the purposes of the present decision, and the party seeking to prevent the wrong has no adequate remedy at law, equity, we think, will afford the remedy. '*Ubi jus, ibi remedium*,' is the maxim which forms the root of all equitable decisions; and, responding to the objection that certain orders issued in the case of *Toledo A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.* (C. C.) 54 Fed. 746, 751, were without precedent, the court said: 'Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was therefore, in its time, without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief.' "

It results from what has been said that, until it shall be determined by the land department that the tract of land in controversy was not vacant and open to settlement at the time of its selection by the predecessors in interest of the complainant, an equity in that tract exists in the complainant, which a court of equity should protect against such acts as are here threatened and complained of. Accordingly a decree will be entered in favor of the complainant, with a provision, however, to the effect that should the land department of the

government, at any time prior to the issuance of a patent for the selected tract, determine that the land was not vacant and open to settlement at the time of its selection, the operation of the decree shall thereupon cease.

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JOHN STRICKLEY ET AL. v. ELMER HILL.

(22 Utah 257; 62 Pac. 893. Supreme Court. July 11, 1900.)

Long residence in this country, voting, service as soldier and receipt of pension considered as evidence in aid of the proof of citizenship.

The rights of a citizen locator are not affected by the fact of a co-locator being an alien.

An alien holding title by grant can pass good title to his grantee at any time before governmental inquiry to set aside his holding.

Service in the army of the United States gives the alien soldier the status of one who has declared his intention to become a citizen.

In adverse claim cases proof of citizenship is required but it may be inferred from circumstances.

[1]**Consent of One Owner to Line.** The consent of an owner of an undivided interest in mining ground to the establishing of a certain line as a boundary cannot bind his co-owner, not consenting.

[2]**Recent Parol Line.** Although when adjoining owners and their predecessors in interest occupy land to a given line, and treat such line as a boundary between their respective lots for 20 years, neither can thereafter claim beyond such line; and although a parol agreement, long acquiesced in, to settle a boundary between adjoining owners, being the result of an honest attempt to fix the true boundary line, according to which the parties and their predecessors have actually occupied and made improvements with reference thereto, though the time has not been sufficient to establish a bar under the statute of limitations, will work an estoppel, yet a recent parol agreement between parties fixing the boundary line between unpatented mining claims is void under the statute of frauds, and, under the circumstances shown, could not bind the government.

Appeal from District Court, Salt Lake County; Ogden Hiles, Judge.

[1]Admission by one of the several locators against his title held not to bind his co-owners. *Muldoon* v. *Brown*, 20 M. R. 269.

[2]Pointing out boundary line to intending purchaser estops the party from claiming beyond it. *Schultz* v. *Allyn*, 18 M. R. 649.

Boundary settlement upheld although afterward found to have been based on mutual mistake. *McGee* v. *Stone*, 2 M. R. 238.

Action by John Strickley and others against Elmer Hill. Judgment for plaintiffs. Defendant appeals. Affirmed.

It is alleged in the complaint that on the 4th day of February, 1886, John J. Jackson and John Tiernan were citizens of the United States, and on that day duly located the Amazon mine No. 2; that the plaintiffs are the successors in interest of said Jackson and Tiernan; that defendant, Hill, claims to be the owner of the Navajo lode mining claim, and that on June 27, 1896, said Hill wrongfully caused said Navajo mine to be surveyed for a patent so as to overlap and include part of said Amazon No. 2 mine; that on June 10, 1897, defendant filed his diagram of said survey, and applied for a United States patent, wrongfully claiming possession of the Navajo lode as surveyed, so including two parcels of land belonging to the Amazon No. 2 lode; that plaintiffs filed a protest to said application and adverse claim,—and prays that plaintiffs be adjudged to be entitled to the possession of said two parcels of land so included in the defendant's survey, and alleged to be in conflict, and asks that title be quieted thereto.

Defendant's answer admits the survey, but denies the other allegations in the complaint. Defendant alleges that Tiernan did not locate the Amazon No. 2, but that John J. Jackson and Frank Selby attempted to make said location,

Corporation not bound to line assented to by its agent. *Overman Co.* v. *American Co.* 2 M. R. 251. *Walrath* v. *Champion Co.* 63 Fed. 552. Affirmed, 19 M. R. 410.

Acquiescence and expenditure on the faith of it will bind to a boundary line short of the statute of limitations. *Pittsburgh Co.* v. *Lake Superior Co.* 118 Mich. 109; 76 N. W. 395.

A location once made is not bound to maintain its boundary stakes. *Book* v. *Justice Co.* 17 M. R. 617.

Loss of corner stakes by act of third parties does not invalidate location. *Tonopah Co.* v. *Tonopah Co.* 125 Fed. 408.

An agreement settling a boundary line is not within the statute of frauds. Overlapping locators held to agreed line. *Id.* 400.

but that both of them were aliens at the time, and ever since have been; that Tiernan never had any interest therein, but that his name was used by Selby for the purpose of making the location for him in circumvention of the laws of the United States, and that said location was fraudulent and void; that the Navajo was located on the 23d day of July, 1891, and ever since has been in his possession, and that he is entitled to receive a patent therefor; that the boundary line between the Navajo and the Amazon No. 2 has never been definitely located and the true line has been in dispute; that upon notice and request of the defendant William Strickley said plaintiff and John J. Jackson met upon the ground and placed the boundaries thereof by agreement and consent; that the application for patent is based upon said agreed lines; that the location of the Amazon No. 2 is void, because the same was not located on unoccupied mineral ground of the United States, and that the plaintiffs have attempted to change the boundaries of the Amazon No. 2. It appears that the Amazon No. 2 was located July 17, 1886, by John Tiernan and John J. Jackson, each locating an undivided one-half of the claim. In 1887, Tiernan conveyed his interest therein to Frank Selby, who was not then a citizen of the United States. This location was made by Tiernan for Selby's benefit. Selby, in 1892, conveyed his interest—then being two-thirds of the ground—to the plaintiff John Strickley, who was a citizen. Jackson continued to own and occupied the remaining one-third interest in the mine, under his location, until his death, May 20, 1897. Harriet J. Angell and Thirza Vilate Angell, by her guardian ad litem, plaintiffs, are the only heirs of Jackson, deceased. Both Jackson and Selby served in the United States army in 1863 and 1864, and were honorably discharged. Jackson was thereafter awarded a United States pension. The Amazon was located May 20, 1882, by Jackson. This location lapsed, and the Amazon No. 2 was located, as stated, upon

about the same ground, with some variations. Proceedings to obtain patent to the Navajo were commenced June 7, 1897. The protest was filed August 3, 1897. Upon the trial the court found the facts in favor of the plaintiffs, and rendered judgment accordingly. From this judgment the defendant appeals.

C. F. & F. C. LOOFBORROW, for appellant.

BOOTH, LEE & RITCHIE, for respondents.

After stating the facts, MINER, J., delivered the opinion of the court.

The appellant contends: First. That the location of the Amazon No. 2, was void, because made by aliens; that under section 2319, Rev. St. U. S., a location could only be made by a citizen of the United States, or those who had declared their intention to become such. Second. That the Amazon No. 2 was not originally located upon unoccupied mineral lands of the United States, as now claimed. Third. That the lines between these properties were fixed, by agreement of the parties, in accordance with the new survey as now claimed, and should not be disturbed.

1. As to the first contention of the appellant, it appears that Tiernan, one of the locators of the Amazon No. 2, was a native-born citizen of the United States, and qualified to make the location; that he and Jackson located the Amazon No, 2 on February 17, 1882. Jackson, the other locator, was reported to have been born in Scotland, but had lived in the United States for many years in the states of California, Montana, and Utah. He was about 63 years old at the time of the location, and was about 75 years old when he died, in 1897. Prior to 1886 he had exercised the right of franchise, and voted at the territorial elections five or six different times. After his death his naturalization papers were not

found among his effects. He had resided near the claim in question at Bingham for several years, and worked the claim. The registrar of election testified that Jackson subscribed and swore to a registration oath then required to be taken by each elector before voting; that such affidavit was taken before him at Bingham on June 4, 1887. That oath was produced from the office of the county clerk, where it was on file, and it was found to have been filed August 3, 1887, and was introduced in evidence. It appears from the oath that Jackson testified that he was over 21 years old; a resident of the territory of Utah for more than six months; that he was a naturalized citizen of the United States, 63 years of age; and that he would support the constitution of the United States, etc. It also appears from the testimony and from his discharge papers, in evidence, that he was a soldier in the war of the Rebellion, and was enrolled in Company B, 1st battalion, Nevada cavalry, August 5, 1863, for three years, or during the war, and was honorably discharged from the service of the United States on the 21st day of July, 1866. Thereafter he was awarded and drew a pension from the United States government on account of disability and injuries received, his feet having been frozen and three toes having been amputated. The trial court found that Tiernan was a citizen; that Jackson became, by due process of naturalization according to law at some time prior to June 4, 1887, a citizen of the United States, and continued a citizen until his death, in March, 1897.

We are of the opinion that there was evidence to sustain the findings. Tiernan was unquestionably a citizen at the time of the location. His rights, nor those of his grantees, would not be affected by the fact that his co-locator was not a citizen. If a citizen and an alien jointly locate a claim not exceeding the amount of ground allowed to one locator, such location is valid as to the citizen, or to one who has declared his intention to become such, and a conveyance by

him through an alien to another citizen conveys a complete title to the claim located, provided all other provisions of the law were complied with, and there be no intervening rights. *North Noonday Co.* v. *Orient Co.* (C. C.) 1 Fed. 522; 1 Lindl. Mines, § 234; *Manuel* v. *Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, *Wilson* v. *Mining Co.*, 19 Utah, 66, 56 Pac. 300. So the fact that the Amazon No. 2 was located by Tiernan, a citizen, and by Jackson, in 1886, before any other location was made, and the claim contained no more than one citizen was authorized to locate, the location of the claim as to Tiernan, is good, even though Jackson was an alien, and not entitled to locate it. *North Noonday Co.* v. *Orient Co.* (C. C.) 1 Fed. 522; *Wilson* v. *Mining Co.*, 19 Utah, 66, 56 Pac. 300. Selby, though an alien, and not having declared his intention to become a citizen of the United States, having received conveyance of an unpatented mining claim from a citizen who located it, could acquire by deed and hold the title the locators of such claim acquired under section 2319, and convey the same before office found, which would not occur until on or after proceedings were commenced to obtain a patent to conflicting lands claimed by the Navajo June 9, 1897, and protest proceedings were filed, and title to the Navajo asserted. In *Phillips* v. *Moore*, 100 U. S. 212, 25 L. Ed. 604, it is said: "By the common law, an alien cannot acquire real property by operation of law, but may take it by act of the grantor, and hold it until office found; that is, until the fact of alienation is authoritatively established by a public officer upon an inquest held at the instance of the government. The proceeding which contains the finding of the fact upon the inquest of the officer is technically designated in the books of the law as 'office found.' It removes the fact upon the existence of which the law devests the estate, and transfers it to the government, from the region of uncertainty, and makes it a matter of record. It was devised, according to the old law writers, as an authentic means to

give the king his right by solemn matter of record, without which he, in general, could neither take nor part with anything; for it was deemed 'a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury.'" *Ferguson* v. *Neville,* 61 Cal. 258; 1 Lindl. Mines, § 233; *Manuel* v. *Wulff,* 152 U. S. 505, 511, 14 Sup. Ct. 651, 38 L. Ed. 532; *North Noonday Co.* v. *Orient Co.,* 6 Sawy. 300, 1 Fed. 522.

But the respondents claim that, because Jackson was an honorably discharged soldier of the United States, no proof of declaration of intention was necessary. By section 2319, Rev. St. U. S., mineral lands of the United States are subject to location by citizens thereof, or those who have declared their intention to become such. Section 2166, Rev. St. U. S., provides that "any alien, of the age of twenty-one years and upwards, who has enlisted, or may enlist, in the armies of the United States, either the regular or volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such." Both Jackson and Selby were shown to have been soldiers, and honorably discharged from the army of the United States. In *Smith* v. *U. S.,* 16 Land Dec. 352, it is held by the general land office at Washington —and such rule has been followed in that department—that an alien 21 years of age, who is honorably discharged after serving an enlistment in the United States army, occupies the status of one who has declared his intention to become a citizen under section 2166, Rev. St. U. S., under the homestead law. In 2 Land Dec. Dep. Int. p. 195, the same rule is laid down, and it is held that service in the United States army, as required by the statute, is equivalent to a declaration of intention to become a citizen; and this rule was approved by the secretary of the interior. These decisions had

reference to homestead entries, but the statutory requirements as to citizenship are the same under section 2289, applying to homesteads, as is section 2319 as to mineral land. This rule has never been questioned in the department, and has not been overthrown, so far as we are able to discover. In *Manuel* v. *Wulff*, 152 U. S. 511, 14 Sup. Ct. 651, and in *Iron Silver M. Co.* v. *Elgin M. & S. Co.*, 118 U. S. 207, 6 Sup. Ct. 1177, the supreme court refer to certain rulings of the department approvingly, and say that to overturn them would seriously affect titles. While we cannot give the weight to these decisions of the department that the respondents claim for them, yet the fact that Jackson served in the army of this country, and was honorably discharged therefrom, has a strong bearing tending to show a declaration of intention to become a citizen, as well as a strong circumstance tending to show naturalization, and, in connection with other facts and circumstances, may be sufficient to establish the fact itself. The general rule is that, where a record has been lost or destroyed, or by lapse of time or death of the person naturalized, and the record cannot be produced, secondary evidence is admissible to prove naturalization. 6 Am. & Eng. Enc. Law, 26. Citizenship may be proved like any other fact, and is a question for the court and jury to pass upon. Section 2321, Rev. St. U. S., provides that proof of citizenship may consist, in the case of an individual locator, of his own affidavit; but in contests like this, where the case is brought under section 2326 Id., in a contest for a patent, proof of citizenship, or the declaration to become such, is required. 1 Lindl. Mines, 226; *North Noonday M. Co.* v. *Orient M. Co.*, 6 Sawy. 300, 1 Fed. 522. The evidence tends to show that Jackson had a long residence in the United States, and spent many years near the mine in question. His death increased the difficulties of securing proof of his naturalization, even if it was obtained. He had exercised the right of citizenship, and voted at many elections prior to the entry of the claim in 1886, and had previ-

ously resided in California and Montana. Among the records of the county clerk required by law to be kept was his affidavit, made and regularly filed in 1887, wherein he testified that he was a naturalized citizen of proper age. The handwriting to the affidavit is shown to be Jackson's writing, and he is shown to be the same man who located the claim. He died in 1897, 10 years after the affidavit was made and filed and became a record in the clerk's office. He assumed to be the owner of the mine, and was dealt with as such owner, and the defendant recognized him as part owner of the Amazon No. 2 when the survey was made in 1896. He had previously, in 1863, enlisted as a soldier in the defense of his country, and was honorably discharged after two years' service, and drew a pension on account of disability and injuries contracted in the United States service. Having resided in three different states where his naturalization papers could have been obtained, and the time when obtained, if at all, being very remote, the difficulties in the way of obtaining primary evidence were increased. The trial court heard all the testimony, and saw the witnesses, and found, as it had right to find, that Jackson was a citizen of the United States because of his naturalization according to law at some time prior to June 4, 1887, and continued such until his death in 1897. There was evidence before the court to support the findings. The question of its weight was within the province of the trial court to determine, and we are not satisfied that its determination is not correct. *Boyd* v. *Nebraska,* 143 U. S. 135, 12 Sup. Ct. 375; *Hogan* v. *Kurtz,* 94 U. S. 773; *Blight* v. *Rochester,* 20 U. S. 534; *O'Donnell* v. *McNally,* 59 How. Prac. 500; *North Noonday M. Co.* v. *Orient M. Co.,* (C. C.) 11 Fed. 126; *Manuel* v. *Wulff,* 152 U. S. 505, 14 Sup. Ct. 651, 1 Lindl. Mines, § 227; *North Noonday M. Co.* v. *Orient M. Co.,* 6 Sawy. 300, 1 Fed. 522.

2. The appellant also contends that the Amazon No. 2 was not originally located upon all the ground now claimed

by the plaintiffs. Each of the parties claim that the other has shifted its boundaries. A large amount of testimony was introduced to sustain these contentions on the part of the appellant, while the respondents also introduced much testimony to show that the ground was the same as first located, and that the Amazon No. 1 had been abandoned by Jackson, the locator, prior to the location of the Amazon No. 2 over substantially the same ground. The testimony was extremely contradictory and conflicting, and the court found the issues in favor of the respondents. We do not deem it necessary to review in detail all the mass of contradictory testimony taken upon that subject. From a careful review of it we are satisfied that the court gave proper weight to it, and we do not feel called upon to disturb its decision in this respect. *Larsen* v. *Onesite,* 59 Pac. 234, 2 Utah 38.

3. Appellant also contends that the line between the Amazon No. 2 and the Navajo mine was fixed by agreement of the parties in accordance with the Navajo survey, and that such line so fixed should not be disturbed. The testimony tends to show that William J. Strickley, son of John Strickley, and Jackson were, by request, present a part of the time when a survey was being made of the Navajo for a patent. William J. Strickley states that he did not appear by request or authority of his father, the plaintiff, but that he was looking after the land and his father's interest, and made no objection to placing the posts and stakes on the northeast and southeast corners of the claim as they were set by the surveyor; but he also testified, and it appears from other testimony, that Jackson did object to the line as was then attempted to be fixed by appellant's surveyor, and objected to the placing of the corner posts and stakes as they were placed between the claims, and was never satisfied with the line. The testimony concerning the agreed boundary was objected to as being within the statute of frauds, and because parties cannot establish a corner as against the government

by consent of the locators. The objection was sustained, but the testimony admitted for the purpose of showing that, if respondents made statements in derogation of the location they now claim, it was admissible, but that the location would control notwithstanding their statements. While the testimony is conflicting and contradictory, we are not satisfied that any agreement was made concerning the line. The testimony does not show that Jackson ever consented to fixing the line or in placing the posts and stakes where the surveyor for the appellant placed them. Whether John Strickley so consented is not important. Jackson and Strickley each owned an undivided interest in the claim. Therefore, Strickley's consent to the boundary line would not bind Jackson, who did not consent. The parol agreement between the parties, if made, as contended for by the appellant, so recently as 1896, is invalid under the statute of frauds. It is extremely doubtful if the government could be bound by such agreement in a case of this character. *Sharp* v. *Blankenship,* 67 Cal. 441, 7 Pac. 848; Browne, St. Frauds, § 75; *Vosburgh* v. *Teator,* 32 N. Y., 561; *Jackson* v. *Long,* 7 Wend. 170. But, as held in *Larsen* v. *Onesite,* 59 Pac. 234, 2 Utah 38, and *McMaster* v. *Morse,* 18 Utah, 21, 55 Pac. 70, where adjoining owners and their predecessors in interest occupy land to a given line, and treat such line as a boundary between their respective lots for 20 years, neither can thereafter claim beyond such line. In Michigan it is held that, unless an attempt to settle a doubtful boundary is honestly made, without mistake or fraud, and in view of a question of the true boundary, the statute of frauds will prevent mere acquiescence in the boundary from operating as an estoppel. *Cronin* v. *Gore,* 38 Mich. 381. It is also held that a parol agreement, long acquiesced in, to settle a boundary between adjoining owners, being the result of an honest attempt to fix the true boundary line according to which the parties and their predecessors have actually occupied, and made improvements with refer-

ence thereto, although the time has not been sufficient to establish a bar under the statute of limitations, will work an estoppel. *Smith* v. *Hamilton,* 20 Mich. 433; *Joyce* v. *Williams,* 26 Mich. 332; *Dupont* v. *Starring,* 42 Mich. 492, 4 N. W. 190. The facts in this case do not bring it within either of the rules referred to. After a careful review of the case, we find no reversible error in the record.

The judgment of the district court is affirmed, with costs.

BARTCH, C. J., and BASKIN, J., concur.

PEOPLE EX REL. BREENE v. DISTRICT COURT OF LAKE COUNTY ET AL.

(27 Colorado 465; 62 Pac. 206. Supreme Court. July 17, 1900.)

Co-tenant in tunnel using it as access to claims owned in severalty. Plaintiff was co-owner with defendants in a group of claims and in a tunnel run to work the same. Defendants were using this tunnel to work a group of claims in which plantiff had no interest, to the exclusion of plaintiff and preventing the working of the group belonging to the tunnel owners.

Held (1) That the District Court had jurisdiction as a Court of Equity to give adequate relief. (2) that the complaint stated a good cause for an injunction and, (3) that a co-tenant could not use the common property for the benefit of another property in which associate had no interest.

Prohibition by the people, on the relation of Peter W. Breene and others, to the district court of Lake county and Frank W. Owers, Judge. Petition for rehearing of application for writ. Petition for rehearing denied.

PATTERSON, RICHARDSON & HAWKINS, for petitioners.

J. A. EWING, for respondents.

In *Butte Co. v. Montana Co.* (24 Mont. 125; 60 Pac. 1039) a defendant, co-tenant with plaintiff in the ownership of a lode reached by workings from a shaft on a lode owned by defendant alone, was enjoined from mining on the common ground though offering to account for the ore mined.

The case is complicated by the Montana statute originally treating mining by single co-owner as a trespass and as amended allowing it under conditions.

Enterprise Co. v. *National Co.* (18 M. R. 312) states the legal position toward his co-lessees of a co-tenant refusing to join in an assignment of an oil lease.

Where a co-tenant refused to join in an advantageous lease of a glass works which he continued to occupy by himself, exclusively, he was held for the ousted co-tenant's full proportion of rental value.

PER CURIAM. The application in this case was disposed of without filing an opinion. Upon petition for rehearing, we have concluded to briefly state our reasons for denying the writ.

In the district court of Lake county, presided over by the Honorable Frank W. Owers, one Mary Marshall brought an action against petitioners, from which it appears that she and the latter are the joint owners of a group of mining claims known as the "Col. Sellers"; that petitioners own an adjoining group, known as the "Silver Wave"; that a tunnel has been run through the Col. Sellers group for the purpose of working those properties, which petitioners have extended into the Silver Wave, and are now using for the purpose of working the latter group. It was also averred in the complaint that petitioners had excluded plaintiff from the tunnel, and prevented her from working the Col. Sellers group through this opening, and particularly that the use of such tunnel to work the Silver Wave group resulted in such exclusion; that by reason of these acts she has been damaged, and has no plain, speedy, or adequate remedy at law, and therefore prays for a writ of injunction enjoining the petitioners from transporting ore or material of any kind from the Silver Wave group through the Col. Sellers tunnel, and

Izard v. *Bodine*, 11 N. J. Eq. 403. Cited, *Edsall* v. *Merrill*, 37 N. J. Eq. 116.

Two co-tenants receiving larger share of consideration of sale decreed to divide excess with the third owner. *Upton* v. *Weisling* (Ariz.), 71 Pac. 917.

A majority ownership gives the right to work the mine, but not to exclude the minority owner from access. *Sweeney* v. *Hanley*, 126 Fed. 97.

Minority owner awarded his full share of value of ore extracted where he had been excluded by fraud. *Id.*

A co-tenant may lawfully bore for oil. If he finds it, he must account to co-tenants, and if he does not, must stand the expense alone. *Lone Acre Co.* v. *Swayne*, — Tex. —; 78 S. W. 380.

also enjoining them from excluding her from the use of such tunnel for the working of the Sellers group. To this complaint petitioners filed a demurrer, which was overruled, and thereupon a writ of injunction issued as prayed. Petitioners then commenced this proceeding here for a writ of prohibition. The several reasons assigned by their counsel why the writ should be issued may be stated as follows: That the district court had no jurisdiction of the subject-matter of the action, and that, if it did, it exceeded its jurisdiction by granting the writ of injunction in a case in which no injunctive relief could be had.

In support of this contention it is urged that the action in the district court is in fact one in ejectment, and that the plaintiff in that action had no right to an injunction of the character issued pending the trial of the question of her ouster by the petitioners. This position is wholly untenable. It is conceded that she owns an interest in the Col. Sellers group, in connection with petitioners; that they have excluded her from the use of the tunnel, which has been run for the benefit of these properties. There is no question of title involved. There is no denial of their exclusive possession of the tunnel in question, as against the plaintiff in the original action. They are using it exclusively to work properties in which she has no interest. The sole question is, do the admitted facts entitle the plaintiff to the relief granted by the interlocutory writ of injunction?

We do not know upon what theory petitioners can assume to use the tunnel for the purpose of working the Silver Wave group, even if by so doing they did not exclude the plaintiff from the use of such tunnel. No authority is cited in support of the application, holding that one co-tenant may use a common property for the benefit of another, in which his co-tenants have no interest whatever. We do not understand that counsel for petitioners claim that they can use the tunnel for this purpose as a matter of right. Conceding, as they

do by the demurrer filed to the complaint, that they have ousted plaintiff from the use of the tunnel, and prevented her from working the property as she would have a right to do by virtue of her ownership of an interest in the Col. Sellers group, petitioners certainly admit that they have invaded her rights. That she is entitled to damages cannot be successfully disputed. A recovery of damages for these acts, in an action at law, would not place her in possession; neither would it prevent petitioners from continuing to exclude her from possession, or from using the tunnel in the manner charged. So that an action at law is not only inadequate, but, on the facts admitted, would necessitate a multiplicity of suits. In such cases a court of equity clearly has the authority to settle disputes of this character by injunction, and in this instance the relief granted by the writ issued is that to which plaintiff is entitled on the established facts. If the title of plaintiff was in dispute, or her ouster by petitioners controverted, a different question might be presented; but, on the facts as charged and admitted, we are of the opinion that the court had jurisdiction, as well as authority, to issue the writ complained of.

Petition for rehearing denied.

HENRY WILLIAMS v. W. G. LONG ET AL.

(129 California 229; 61 Pac. 1087. Supreme Court, July 19, 1900.)

A vendee in default on payments may in a proper case be enjoined from mining.

A defendant cannot rightfully be enjoined from "entering" or trespassing upon land of which he is in the conceded possession. He may be enjoined from committing waste but not from working or otherwise exercising the incidents of possession.

The forfeiture or reversion to the vendor—the right to restoration of possession—are questions which can be determined only on final hearing.

Commissioners' decision. Department 1. Appeal from Superior Court, Tuolumne County.

Ejectment by Henry Williams against one Long and an other. From an order refusing to dissolve a preliminary injunction, defendant, the Gagnere Mining Company, appeals. Injunction modified.

Instance of possession of real estate (zinc mine) delivered as incident to equitable relief prayed. The court will not decree possession where a question of title at law remains undetermined. *Lehigh Co.* v. *Trotter*, 43 N. J. Eq. 185; 10 Atl. 608.

Construction of the Dakota act restoring parties to possession where ousted by force from mining claims. *Cole* v. *Cady*, 2 Dak. 29; 3 N. W. 322.

Entering upon a mine and holding possession by force is ground for injunction under the jumping act of Colorado. *Sprague* v. *Locke*, 1 Colo. App. 171; 28 Pac. 142.

An injunction against owner and lessee does not bind a contractor and if he stops he has no remedy on the injunction bond. *Dunham* v. *Seiberling*, 12 Ind. App. 210; 39 N. E. 1044.

Landlord repossessed of demised premises through trickery, enjoined. *Genesee Co.* v. *Retsof Co.* 36 N. Y. Sup. 896.

Relation of ejectment to the injunction suit. *Heyward* v. *Farmers' Co.*, 42 S. C. 138; 19 S. E. 963. See *Waterloo Co.* v. *Doe*, 19 M. R. 1, and notes.

C. C. HAMILTON, for appellant.

F. P. OTIS, for respondent.

SMITH, C. Appeal from an order refusing to dissolve a preliminary injunction restraining the defendants "from entering in and upon the mining claim of the plaintiff [called the "Marryatt Mine"], and from mining and working thereon, and from taking and removing any gold and gold-bearing earth and rock therefrom, and from in any manner trespassing thereon."

The injunction was issued without notice on the verified complaint.

The complaint is in ejectment, in the ordinary form, but alleges, also, in effect, that the defendants are mining the premises in controversy, and have removed and are removing therefrom gold-bearing earth and rock, and will continue to do so unless restrained. It appears from the affidavits used on the hearing of the motion to dissolve that the defendant corporation was in possession of the premises in controversy

It must be an extreme case to deprive a party of his possession by receiver or injunction on a preliminary hearing. *Cosmos Co.* v. *Gray Eagle Co.* 104 Fed. 20.

Plaintiffs being in possession they need not bring ejectment in aid. *Allen* v. *Dunlap*, 24 Oreg. 229; 33 Pac. 675.

An applicant for a crown lease to mine in New South Wales has sufficient property right to be entitled to the protection of an injunction. *Zobel* v. *Croudace*, L. R. App. Ca. 258 (1899).

A railroad may be enjoined from sinking gas well on its right of way. *Consumers' Co.* v. *American Co.* — Ind. —; 68 N. E. 1020.

An injunction against selling or removing ore is not an injunction against mining. *Benton* v. *Hopkins*, — Colo. —; 74 Pac. 891.

An injunction forbidding the sale of placer claims which had been adjudged a nuisance is beyond the power of the court. *Yuba County* v. *Kate Hayes Co.* 141 Cal. 360; 74 Pac. 1049.

Mine owner enjoined from hindering work of his licensees. *Jack Harvard Co.* v. *Continental Co.* — Mo. —; 80 S. W. 12.

under a contract of sale made by the plaintiff to the defendant Long, its grantor, and was in default in the payment of one of the installments of the purchase money, and also that it was the owner of an adjoining mine, which it was then engaged in working, and from which the only outlet for removing the ore mined was through the Marryatt mine, by means of appliances constructed therein by defendant, and that the Gagnere mine could not otherwise be worked, except by the construction of a new shaft and appliances, at a heavy expenditure of time and money. Other matters are stated in the affidavit of the defendants, as, e. g., certain facts alleged in excuse for default in payment; the irreparable damage that would be done to the defendant corporation by closing its mine; that it had not taken any ore from the Marryatt mine since its default in payment (which is not denied); and that it had no intention of doing so, etc., but these we do not deem it necessary to consider.

It is quite clear that, upon the facts alleged in the complaint, the court was justified in restraining the defendant "from taking and removing * * * gold and gold-bearing earth and rock" from the mine. Nor was its discretion to maintain the injunction affected by the facts disclosed by the affidavits. 2 Beach, Inj. §§ 1167 et seq., 1171, 1172, 1175. But an injunction, in an ejectment suit, to restrain the defendant "from entering upon" the land sued for, or "from in any manner trespassing thereon," is a contradiction in terms, and therefore meaningless; for, in the technical sense of the words, one cannot enter or trespass on land of which he is already in possession. Nor can the defendants be restrained from "working" thereon, provided they do not commit waste.

The contention of respondent that under the express terms of the contract the land was to revert to him, on default, with all improvements, etc., cannot, on this appeal, be considered. Whether, upon the facts to be disclosed on the trial, the land

shall so revert, and whether the plaintiff shall be restored to the possession, are questions to be determined at the final hearing. In the meantime all that plaintiff is entitled to is that the defendants be restrained from extracting and removing ore from the mine or from committing waste. In all other respects they are entitled, pending the suit, to use the mine as their occasions may demand. We advise that the order appealed from be reversed, and the cause remanded, with directions to the court to modify the injunction heretofore issued in the case as indicated in this opinion.

CHIPMAN, C., and HAYNES, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed, and the cause remanded, with directions to the court to modify the injunction heretofore issued in the case as indicated in this opinion.

HARRISON, J.; VAN DYKE, J.; GAROUTTE, J.

Hearing in Bank denied.

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ABANDONMENT.

1. *Abandonment before record.*—Where the active locators of the claim after putting up monuments throw them down and move away without intent to return, the abandonment is complete, notwithstanding the period allowed by law to perfect location has not expired. *Kinney* v. *Fleming.* 13

2. *After actual abandonment* there can be no trespass upon, or invasion of the rights of the prior locators. *Id.*

3. *Abandonment a question of fact.*—Whether or not a lessee has abandoned his lease so as to entitle the lessor to re-entry is for the jury to determine from the acts and intentions of the parties. *Aye* v. *Philadelphia Co.,* 177

4. *Co-lessee unable to contribute.*—One of the several co-lessees gave written notice that he could not contribute his share of the expenses and that he was "out of it." His associates held on to the lease, which was afterwards sold for a large sum. *Held,* that there was a complete abandonment. *Palmer* v. *Moore,* 412

5. *The subsequent working by the co-lessee* out of his own resources is an acceptance of the abandonment. *Id.*

6. *A vested legal interest* may not be abandoned without acts equivalent to an agreement or license, but the disclaimer by plaintiff and the expenditure by his associates makes such an agreement as perfects the abandonment. *Id.*

ACCOUNT.

1. *Equity, as a general rule, does not entertain a bill of account* between partners unless a dissolution and winding up are asked, and cause therefor shown. Then there should be dissolution and full final account. *Childers* v. *Neely,* 223

See LACHES; LIEN 3.

ADVERSE CLAIM.

1. *A third party who has not filed an adverse claim* cannot intervene in the suit supporting an adverse claim brought by another

ADVERSE CLAIM. *Continued.*

although he asserts a title hostile to both parties. *Murray* v. *Polglase*, 296

2. *The action supporting an adverse claim may be ejectment* or a suit to quiet title according to the position of the parties at the time. *Id.*

3. *The action is part of a statutory procedure* and only one who has filed the adverse claim and who can allege that he filed it within the 60 days and brings his suit within 30 days can appear as a suitor to defeat the alleged title of the applicant for patent. *Id.*

4. *Cancelled entry.*—Where a receiver's receipt, under which plaintiff is seeking to establish an adverse claim to a mining location, is shown to have been cancelled, evidence of defendant's adverse location and publication of notice are admissible in evidence. *Id.*

5. *The applicant for patent should be made defendant* to a suit supporting an adverse claim although he may have sold the lode and his assigns are made a party also. *Blackburn* v. *Portland M. Co.*, 358

6. *The suit may be brought in any court* of competent jurisdiction either state or federal, but if in a federal court the value of the matter in controversy must exceed $2,000, and there must be diverse citizenship. *Id.*

7. *No federal question involved.*—A suit supporting an adverse claim is not a suit arising under the laws of the United States in such sense as to allow of it being brought in a Federal Court regardless of citizenship. *Id.*

See ALIEN, 5; LOCATION CERTIFICATE, 5; MINERAL LANDS, 1.

ALIEN.

1. *Long residence in this country*, voting, service as soldier and receipt of pension considered as evidence in aid of the proof of citizenship. *Strickley* v. *Hill*, 722

2. *The rights of a citizen locator* are not affected by the fact of a co-locator being an alien. *Id.*

3. *An alien holding title by grant* can pass good title to his grantee at any time before governmental inquiry to set aside his holding. *Id.*

4. *Service in the army* of the United States gives the alien soldier the status of one who has declared his intention to become a citizen. *Id.*

5. *In adverse claim cases proof of citizenship* is required but it may be inferred from circumstances. *Id.*

ANNUAL LABOR.

1. *During location year.*—Work may be required by district rule during the location year. *Northmore* v. *Simmons*, 128

2. *The amount of annual labor may by district rule be made to exceed $100*, but the rule cannot under the act of congress decrease the amount below $100. *Id.*

3. *Receiver to perform annual labor.*—A court will appoint a receiver to take charge of public lands claimed by both parties under the mining laws of the United States, to the end that the required work may be done thereon for the benefit of the party entitled thereto, where the proof shows that the complainant has reasonable ground for his claim of ownership. *Nevada S. Oil Co.* v. *Home Oil Co.*, 283

4. *Where the receiver's receipt has been obtained by fraud* the fact of entry does not relieve from the necessity of doing annual labor. *Murray* v. *Polglase*, 296

5. *Effect of cancellation of receiver's receipt.*—Where a receiver's receipt, showing that the entryman of a mining claim is entitled to the patent, is subsequently annulled for fraud practiced in obtaining it, and the entryman has failed to do the annual representation work, the claim is subject to relocation. *Id.*

6. *The annual labor upon a mining claim* may be made in labor or improvements on the claim itself or one of a group of contiguous claims, or in instances upon adjoining ground not included in any claim. *Power* v. *Sla*, 659

7. *Labor and improvements are not synonymous terms* and the non-doing of one and the non-placing of the other must be both averred. *Id.*

8. *The amount of annual labor proved* is for the jury to determine, and the court will not disturb their verdict where, though contradictory, there was sufficient evidence to sustain it. *Beals* v. *Cone*, 593

9. *Failure to do the annual labor does not ipso facto work a forfeiture.*—The location, once valid, remains so whether the annual labor be performed or neglected until another initiates a new location. This is the forfeiture: and the burden of proving the work not done by fair preponderance of evidence is on the forfeitor or relocator. *Id.*

APEX.

1. *The prior locator is entitled to all veins* which apex within the area of conflict with the junior location. *Calhoun M. Co.* v. *Ajax M. Co.*, 192

2. *Where two veins having apexes in different claims, unite on their dip*, within the perpendicular extension of the side lines of

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another claim, the owners of the last claim cannot contest as to the rights in the vein beyond the point of union, since they have no interest in either vein. *Roxanna M. Co.* v. *Cone*, 323

3. *Facts of the case—Explanation of plat.*—A vein was found in the Doctor Patent which extended through at least one end line and then ran into the Elizabeth Cooper patent which it was alleged to cross from side line to side line and then to enter within the Jack Pot lines. The Jack Pot was supposed on complainant's theory to have the same vein and a second vein which after leaving the Jack Pot side line crossed the Elizabeth Cooper towards or into the Doctor, which second vein, on its dip united with the Doctor vein at or above the Doctor 12th level. At this 12th level the Doctor vein had been followed on its dip north until it was within the vertical lines of complainant's Mountain Monarch patent: *Held*, that the complainant, having no apex, the vein below the point of union belonged to the Doctor, which had an apex, or to the E. C., which might have an apex, and that it ought not to be assumed in a controversy to which the E. C. owners were not parties that the vein in the E. C. so crossed its side lines as to have no extra lateral rights. *Id.*

4. *Location of discovery vein across strike—Other lode parallel to side lines.*—When a location has been made upon a vein across instead of along the strike of the vein discovered the side lines become the end lines. Such claim has no extralateral rights and the later finding of another vein having a course parallel to the side lines does not aid the contention to pass such side lines. *Cosmopolitan M. Co.* v. *Foote*, 497

5. *Complaint in action for extralateral ore.*—A complaint which alleges that plaintiff is the owner of a mining claim, and of all the precious metals contained in any vein or lode, through its entire depth, whose apex is within the surface lines of such claim, and that defendant, the owner of the claim which adjoins one of the side lines of plaintiff's, has mined and removed ore from a vein which has its apex in plaintiff's claim, is sufficient, in the absence of a demurrer thereto, to support a judgment in favor of plaintiff for the conversion of such ore, although it does not specifically allege the facts which show that the boundary between the claims of the parties is a side line of plaintiff's claim, beyond which it has extralateral rights. *Montana M. Co.* v. *St. Louis M. Co.*, 507

6. *Possession of the surface of a mining claim is possession of a vein or lode* having its apex within the surface lines of the claim, although, in extending downward, such vein may pass beyond the vertical side lines of the claim, and will support an

APEX. *Continued.*

action of trespass for the removal of ore from such vein, beneath the surface of an adjoining claim. *Id.*

7. *May follow vein on dip beyond end lines.*—Under the rule that where a lode mining claim is located across, instead of along, the vein, the original side lines become end lines, and the end lines side lines, the owner is entitled to all the rights with reference to the new side lines that he would have had if they had originally been located as such, including the right to follow the dip of a vein having its apex within the surface boundaries of his claim, beyond the vertical plane passing through such end lines. *Empire M. Co.* v. *Tombstone M. Co.*, 443

See ESTOPPEL, 3; INJUNCTION, 2.

APPEAL.

1. *Where an appeal is from the judgment and an order denying new trial*, made after judgment, but never entered, it will be considered as from the judgment alone. *McCarthy* v. *Speed*, 124

See INJUNCTION, 1.

ASSAY.

1. *Average assay.*—Under a contract between a mining company and a milling company the latter was to treat the ore in the usual and ordinary manner and "returns therefrom shall not be less than 70 per cent. of the pulp assay."—The mill was not bound to return 70 per cent. on each ton of ore, but was bound to show such average return on all the ore furnished. *Fox* v. *Mackay*, 89

BROKER.

1. *Instruction as to other brokers.*—An instruction to the effect that, where a principal employs several agents to sell a piece of property the agent through whose efforts the purchaser is produced is alone entitled to commission, is erroneous where there is no evidence that any other agent than plaintiffs had been employed. *Leech* v. *Clemons*, 186

2. *Introduction not essential.*—Where an agent produces a customer and is the procuring cause of a sale he is entitled to his commission notwithstanding he may not have formally introduced the purchaser to his principal. *Id.*

3. *Previous payment to wrong party.*—Where agents authorized by the owner to sell property are instrumental, through an employee of a sub-agent in producing a purchaser, and the principal completed the sale with knowledge of their claims, they are entitled

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BROKER. *Continued.*

to recover their commission notwithstanding the principal had already paid a commission to the party who actually introduced the purchaser. *Id.*

BOUNDARIES.

1. *Consent of one owner to line.*—The consent of an owner of an undivided interest in mining ground to the establishing of a certain line as a boundary cannot bind his co-owner, not consenting. *Strickley* v. *Hill*, 722

2. *Recent parol line.*—Although when adjoining owners and their predecessors in interest occupy land to a given line, and treat such line as a boundary between their respective lots for 20 years, neither can thereafter claim beyond such line; and altho' a parol agreement, long acquiesced in, to settle a boundary between adjoining owners, being the result of an honest attempt to fix the true boundary line, according to which the parties and their predecessors have actually occupied and made improvements with reference thereto, though the time has not been sufficient to establish a bar under the statute of limitations, will work an estoppel, yet a recent parol agreement between parties fixing the boundary line between unpatented mining claims is void under the statute of frauds, and, under the circumstances shown, could not bind the government. *Id.*

See CONVEYANCE; EVIDENCE, 1, 3; MEASURE OF DAMAGES, 2.

CONSIDERATION.

1. *Unilateral contract.*—If one party to a contract is not bound to do the act which forms the consideration for the promise, undertaking, or agreement of the other, the contract is void for want of mutuality. *Eclipse Co.* v. *S. Penn Co.*, 234

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CONTEMPT.

1. *An insignificant technical violation* of an injunction will not be punished as a contempt, where the violation was not with any intention to disobey the injunction. *Boston M. Co.* v. *Montana Co.*, 492

2. *Misunderstanding of orders.*—Where defendant's foreman was instructed to run a drift westerly, but through misunderstanding his orders, ran it in an easterly direction upon plaintiff's mining ground and extracted a small quantity of ore therefrom, there was a technical violation of the injunction, which might be punished by a nominal fine. *Id.*

CONTEMPT. *Continued.*

3. *Charging guilt by inference.*—Courts will not punish as for contempt where the allegations charge merely by argument and inference that defendant is guilty of the acts charged.

4. *Where the violation is willful,* the facts sufficiently charged and the proof clear, the enjoined parties should expect no lenity. *Id.*

CONTRACT.

1. *Contract to pay out of ore proceeds may become absolute.*—Where it is provided in a contract "that certain sums named shall be paid the defendant mining company *pro rata* out of the proceeds of ore sales, compromises, or otherwise," and immediately thereafter it is provided that no other money shall be paid out, except for necessary operations, until after the payment of the sums mentioned, the proper construction of the terms mentioned is that, if the net proceeds of ore sales, and those derived from compromises, did not, within a reasonable time, amount to a sum sufficient to liquidate said amounts, the obligation to pay was to become absolute, and not dependent upon either the proceeds of ore sales or compromises. *McIntyre* v. *Ajax M. Co.*, 142

2. *Reasonable time to find proceeds of ore.*—In the absence of any showing as to the facilities of the defendant corporation to produce ore from ore sales, compromises, or otherwise the sums of $34,000, specified in the contract, 27 months is not an unreasonable time in which to delay payment of said sums, and the time between the filing of the complaint and the trial cannot be taken into consideration in determining whether a reasonable time has elapsed, because it forms no part of plaintiff's cause of action, as set out in the complaint. A promise to extend the time of performing a contract is not binding unless made upon some new consideration. *Id.*

See ASSAY, 1; CONSIDERATION, 1; CORPORATION, 3; ESTOPPEL, 3; TIME, 1.

CONVEYANCE.

1. *Dip rights—Effect of sweeping clause.*—In compliance with a decree for specific performance of a contract made between the owners of two adjoining mining claims in settlement of a suit brought to determine a disputed boundary between them, the owner of one claim conveyed to the owner of the other the strip in dispute, "together with all the mineral therein contained, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock, and earth therein." *Held,* that such conveyance had no other effect than to fix the surface boundary

CONVEYANCE. *Continued.*

between the two claims in accordance with the original contention of the grantee, and did not deprive the grantor of any extralateral rights under the ground so conveyed; such boundary being a side line of its claim. *Montana Co.* v. *St. Louis Co.*, 507

See ALIEN, 3.

CORPORATIONS.

1. *Natural gas companies* are public corporations having the right of eminent domain. *St. Mary's Co.* v. *County of Elk*, 76

2. *Valid state regulation of foreign corporations.*—A territorial statute requiring foreign corporations, before carrying on business within the territory, to file copies of their articles of incorporation, and appoint an agent on whom process may be served therein, imposes reasonable requirements as a condition precedent to the right to do business in the territory, and is valid. *Empire M. Co.* v. *Tombstone M. Co.*, 443

3. *A single contract made by a corporation* owning mining ground in a territory, by which it employs and agrees to pay a second party to exploit and develop the property, does not constitute a carrying on of business in the territory by the corporation, within the meaning of a statute requiring foreign corporations carrying on business within the territory to file copies of their articles of incorporation, and providing that every act done by them prior to the filing thereof shall be void; and such statute does not affect the validity of the contract. *Id.*

See FRAUD, 2-4; MINERAL LANDS, 2.

COVENANT—See LEASE; OIL, 5.

CROSS LODE.

1. *The junior locator has an easement* for right of way to follow his vein across the prior location for the purpose of the convenient working of his mine, but not for the purpose of taking any ore from within the surface boundaries of the prior location. *Branagan* v. *Dulaney*, 8 Colo. 408 overruled. *Calhoun* v. *Ajax M. Co.*, 192

DESCRIPTION —See LOCATION CERTIFICATE; RELOCATION, 5.

DISCOVERY.

1. *Surface indications of oil.*—To constitute a prior discovery which will support a location of public ground as an oil placer

DISCOVERY. *Continued.*

claim under the mining laws, the locator must have actually discovered oil within the limits of the claim. Mere surface indications of the existence of oil therein, however strong, are not sufficient, nor is the existence of oil upon adjoining lands. *Nevada S. Oil Co.* v. *Home Oil Co.*, 283

2. *Discovery after location.*—In the absence of any intervening rights, the fact that mineral is not discovered on a claim until after the notice of location is posted and the boundary marked is immaterial, and, where the discovery is the result of work subsequently done by the locator, his possessory rights under his location are complete from the date of such discovery. *Id.*

3. *Adopting discovery of another.*—While it is not necessary that a locator should be the first discoverer of mineral upon the land, in order that a prior discovery by another shall inure to his benefit, and give validity to his location, it must have been known to and adopted and claimed by him. *Id.*

4. *Discovery does not relate back—Exclusion of original location certificate.*—Rev. St. U. S. § 2320, provides no location of a mining claim shall be made until discovery of the vein or lode within the limits of the claim located. Plaintiff filed his certificate of location in May, 1892, but did not make discovery until April, 1894, at which time he relocated the premises. Before such discovery, defendant made a discovery and location on the premises. *Held*, that plaintiff's discovery would not relate back to the time of the filing of the original location, so as to cut out intervening rights, and hence such original certificate of location was not admissible in evidence as against defendant. *Beals* v. *Cone*, 591

5. *A location without a discovery carries* with it no rights. *Id.*

6. *Ore specimens on rebuttal.* Specimens are used to prove mineral at the place from which taken, and as plaintiff had offered evidence of the existence of a vein at such place, the samples of minerals offered in rebuttal went only to the same point and were properly excluded. *Id.*

7. *Location of oil land without discovery void.*—The location as an oil placer mining claim of public lands upon which no discovery of oil had been made vests the locator with no rights in such lands as against the United States, or as against one susequently acquiring the title thereto or rights therein from the United States by any legal means prior to any such discovery. *Olive Co.* v. *Olmstead*, 700

8. *Discovery of mineral after lawful entry.*—One entering public lands, who has paid the purchase price, or performed all the conditions requisite to entitle him to a patent therefor, is vested with the equitable title, and his right to the patent can only be defeated by a finding by the land department that he was not quali-

DISCOVERY. *Continued.*

fied to acquire the title, or that the land was not subject to his entry, and the character of the land is to be determined by the facts as known to exist at the date of such entry. His rights cannot be affected by any subsequent discovery of mineral, or by any other fact which would take the land out of the class in which it stood when the entry was made. *Id.*

See ESTOPPEL, 2; LAND OFFICE, 4; LOCATION; PATENT, 2; RELOCATION, 1.

DISCOVERY SHAFT.

1. *Discovery shaft on foreign ground.*—If the initial post of a mining claim is in the United States territory the claim is utterly void. *Madden* v. *Connell*, 158

2. *The state statute requires that the discovery shaft show a well defined crevice.*—A "crevice" means a mineral bearing vein. Discovery of a vein in another shaft will not supply the absence of such discovery in the discovery shaft. *Beals* v. *Cone*, 593

See DISTRICT RULES; RELOCATION, 6.

DISTRICT RULES.

1. *Work required by district rule.*—A district rule requiring a ten-foot shaft or tunnel to be sunk or run within 90 days from date of location is valid. *Northmore* v. *Simmons*, 128

See ANNUAL LABOR, 1, 2.

EJECTMENT.

1. *Ouster.*—Where one enters upon the mining claim of another under claim of title thereto, and mines thereon, and warns such other not to mine thereon, such conduct amounts to an ouster from the territory of the latter claimed by the former. *Bramlett* v. *Flick*, 103

2. *Equitable defenses* as well as defenses at law may be interposed in ejectment, but in such case the answer must contain all the allegations necessary to warrant the relief sought. *Power* v. *Sla*, 659

See POSSESSION.

EMINENT DOMAIN.

1. *Eminent domain a judicial question.* Whenever the extent of the right of eminent domain is not specifically defined and limited by the law, the question as to the necessary and proper exercise of the right by the corporation invested therewith, is one which must ultimately be determined by the courts, and not by the corporation itself. *St. Mary's Co.* v. *County of Elk*, 76

ESTOPPEL.

1. *Fluctuating value—Allowing expenditures.*—One claiming an interest in mining property that is subject to great and sudden fluctuations in value, or the value of which is uncertain, cannot remain silent and inactive, awaiting developments, while those in possession are expending money in its development, and a court of equity will deny him relief, where he has failed to bring suit within a comparatively short period. *Curtis* v. *Lakin*, 35

2. *Locators cannot impeach their own discovery.*—The locators of a mining claim and the subsequent grantees of such locators are estopped to deny that there was no discovery to support the location as against parties to whom they convey such title. *McCarthy* v. *Speed*, 124

3. *Working contract between adjoining mines, no estoppel as to title.*—Defendant, the owner of a mine, contracted with plaintiff, which owned an adjoining claim, to extend its workings into such claim, for a stipulated price, for the purpose of exploiting and developing the property, and agreed that, should any marketable ore be taken therefrom in the course of such development, it would sell the same, and account to plaintiff for the proceeds. *Held*, that defendant was not estopped by such contract from claiming the proceeds of ore so removed and sold as its own, where, in making the development, it discovered that the vein from which it took such ore had its apex within the lines of its own claim, and the ore was, therefore, its own property. *Empire M. Co.* v. *Tombstone M. Co.*, 443

See LAND OFFICE, 2.

EVIDENCE.

1. *Surveyor explaining map.*—Where one mining claim encroaches upon another, it is not error to permit the engineer, who has made a plat thereof, to point out the exterior boundaries of the encroaching claim, as it tends to enlighten the jury as to the controversy. *Bramlett* v. *Flick*. 103

2. *Opinion question.*—A question as to whether a practical surveyor, familiar with the method of locating claims, and familiar with surveys in mountainous countries and with the neighborhood, could take the description in a notice of location of a claim, and, starting at the point of discovery, find the claim described therein, is incompetent, as calling for an opinion. *Id.*

3. *Proof as to blazes.*—In an action to determine the boundaries of conflicting mining claims, evidence as to whether or not a surveyor found the boundaries of a claim without assistance, whether the blazing upon posts appeared to be old or new, and whether he could readily find the blazes on the trees along the boundaries,

EVIDENCE. *Continued.*

and whether they could be traced from one to another, relates to matters of fact, and is not open to the objection of being opinion evidence. *Id.*

4. *To establish a prima facie case*, the evidence must show the existence of facts which, either alone or aided by other facts presumed to exist from those established by the evidence, warrant a recovery, if not overcome by counter evidence. *McIntyre* v. *Ajax M. Co.*, 143

5. *Negative facts known to adverse party.*—Where the plaintiff grounds his right of action on negative allegations, the negative averments which lie peculiarly within the knowledge of the opposing party are taken as true, unless disproved by that party. *Id.*

6. *Where the plaintiff's cause of action is not based upon any negative allegations*, but the facts which he is required to prove are all affirmative, before the burden of proof can be shifted from the plaintiff he must make a prima facie case. *Id.*

7. *Admissions by one of several locators.*—In an action to determine ownership and right to possession of certain mining ground, evidence of statements, of one of several plaintiffs, as to the antedating by him of the location notice, made in the absence of his co-plaintiffs, and not concurred in by them, is hearsay, and inadmissible to bind them. *Muldoon* v. *Brown*, 269

8. *The admission of evidence in rebuttal* which ought to have been given in chief is harmless, where the new proof added nothing to the case as it had been made. *Updegraff* v. *Lesem*, 620

See ADVERSE CLAIM, 4; ALIEN, 1; DISCOVERY, 6; PROSPECTING CONTRACT, 5; TRUST, 3, 4; WITNESS.

EXECUTORS AND ADMINISTRATORS.

1. *An action can be maintained against an executor* for breach of covenant of a lease committed by his testator. *Knotts* v. *McGregor*, 432

2. *Misjoinder.*—A cause of action against a decedent's estate cannot be joined in the same action with a cause of action against the personal representative individually. *Id.*

See LIEN, 5.

FIXTURES.

1. *Removal of fixtures.*—A tenant forfeiting a lease has a reasonable time to remove fixtures. *Cassell* v. *Crothers*, 160

2. *Form of action for conversion of fixtures.*—Where a lessor has reentered for the purpose of determining a tenancy at will he has no right to seize and convert the fixtures belonging to the tenant who has a reasonable time to remove them. The tenant, however,

FIXTURES. *Continued.*

can have no relief in ejectment but must sue for the conversion. *Id.*

3. *Fixtures not realty—Venue.*—Fixtures are not real estate and the law concerning the venue of actions as to real estate does not control actions for conversion of fixtures. *Updegraff* v. *Lesem,* 620

4. *Complaint need not set out lease.*—In an action for the conversion of personalty, a complaint averring a lease of certain mining premises, on which plaintiff placed certain improvements, and of which defendant had wrongfully taken possession, is not demurrable for failure to allege the execution of the lease or to set forth a copy of it. *Id.*

5. *A lessee by forfeiture does not lose the right to fixtures,* nor does the rule attach that he must remove them during the term, for the term is not closed by his own act. *Id.*

6. *Nine months may not be an unreasonable time* to remove fixtures. *Id.*

FOREST RESERVE—See MINERAL LANDS, 6.

FORFEITURE.

1. *A notice of forfeiture by one of several co-lessors,* who does not act for the others, is effectual only as to his individual interest in the lease. *Updegraff* v. *Lesem,* 620

2. *On the issue as to whether a forfeiture of the lease had been declared* evidence as to the manner in which the mine was worked, although improper work was cause of forfeiture, is wholly immaterial to the issue as framed. *Id.*

3. *The plea of forfeiture is one of confession and avoidance* and admits a prior right in the plaintiff. *Power* v. *Sla,* 659

4. *Essentials of such plea.* One who relies upon such plea must show the facts upon which he relies to overturn the prior right of plaintiff and establish also such right in himself. *Id.*

5. *He assumes the burden of proof* and must make good his case by clear and convincing testimony. *Id.*

See ANNUAL LABOR; FIXTURES, 1; INJUNCTION, 4, 12; LEASE, 3, 19; TIME, 1.

FRAUD.

1. *Fraud, when relied upon as a defense, must be specifically pleaded* in an answer as well as in a complaint; and, where fraud in making a mining location is not charged in the answer, evidence of admissions and declarations of the locator in relation to such location, tending to show fraud on his part, is inadmissible. *Muldoon* v. *Brown,* 269

FRAUD. *Continued.*

2. *Fiduciary relation between officers and company.*—The directors or other governing members of a corporation, in their dealings respecting corporate interests, are subject to the rules which govern the acts of persons occupying fiduciary relations; and, therefore, it is a breach of their fiduciary obligations for such officers, by acquiring property for themselves, to interfere with the enjoyment by a corporation of beneficial property rights or to prevent the corporation from acquiring property, or in any way impairing the value of the corporation's property rendering it less effectual for the purposes of its corporate creation; and such derelictions will, in equity, be construed as a fraud on the corporation, establishing a constructive trust in its favor. *Lagarde* v. *Anniston Co.*, 545

3. *Officers purchasing land optioned to their company.*—Where defendants, who were president and secretary of plaintiff corporation, knew that the latter had a lease on certain land, and a contract for its purchase, it was a breach of the trust arising out of their fiduciary relation for them to purchase such land for their own use, and equity will hold them trustees thereof for the benefit of plaintiff. *Id.*

4. *The mere fact that the plaintiff corporation was negotiating* for the purchase of certain property did not give it such an interest or expectancy therein as would render a purchase thereof by its president and secretary a breach of their fiduciary obligation amounting to a fraud. *Id.*

See LOCATION CERTIFICATE, 6, 7.

INDIAN RESERVATION—See MINERAL LANDS, 1.

INJUNCTION.

1. *The discretion of the lower court* in granting and dissolving injunctions is not unlimited. The right of appeal, from its exercise, involves the right to review the facts upon which it was exercised and to reverse for abuse of discretion. *Montana Co.* v. *Boston Co.*, 1

2. *The mere chance of a lode apexing* within plaintiff's territory is not sufficient grounds upon which to base a writ enjoining mining upon such lode. *Id.*

3. *An injunction against assertion of title* by suit is unusual and upon the case made is without authority of law. *Id.*

4. *Alleged abuse of process of the court.*—It is ground for dissolution that complainant is doing the same acts which he enjoins the defendant from doing and is abusing the process of the court, but the rule will not be applied where complainant is not removing

INJUNCTION. *Continued.*

ore from the enjoined mine and is only working to save the claims from reverting to the government and using the mill only to such extent as to save the insurance policy from forfeiture. *Silver Peak Mines* v. *Hanchett*, 19

5. *Facts of the case.*—As ancillary to an action at law, the owner of a mine filed a bill for injunction against one claiming the right of possession; and defendant was enjoined not to operate the mine, or interfere with the mining property, or commit trespass, waste, or nuisance. Subsequently an agent of defendant in charge of the premises turned them over to complainant. Complainant afterwards extended a tunnel for the purpose of performing the annual assessment work, the ore so extracted remaining on the dump; and to avoid a forfeiture of a policy of insurance covering a quartz mill, complainant kept a watchman on the premises. *Held*, that the acts of complainant tended to preserve the property, and hence the injunction would not be dissolved. *Id.*

6. *A court of equity has jurisdiction* and it is its settled practice to enjoin destructive and continuing trespasses. *Dimick* v. *Shaw*, 49

7. *Circumstances leading to the exercise of that jurisdiction.*—A circuit court of appeals will not disturb an interlocutory order granting an injunction where the questions of law or fact to be ultimately determined are difficult, and injury to the moving party will be immediate, certain, and great if the relief is denied, while the loss of the opposing party will be comparatively small if it is granted. *Id.*

8. *No forced construction of equity pleadings—Future injuries.*—Defendant's denial in his answer in such case "that he threatened or threatens or intends to dump any tailings or debris from his mill into said stream or waters of said creek," does not entitle plaintiff to an injunction against the pollution of the waters of the creek by defendant, on the grounds that the injunction cannot injure defendant under such circumstances, and that plaintiff is entitled to protection against defendant's pollution of such waters in the future. *Otaheite Co.* v. *Dean*, 688

9. *Sinking for oil enjoined by entryman.*—One acquiring the equitable title to land by selecting the same under such act in lieu of land which he held by patent and surrendered to the government may, prior to the issuance to him of a patent therefor, maintain a suit in equity to enjoin a defendant from sinking oil wells thereon and taking oil therefrom. *Olive Co.* v. *Olmstead*, 701

10. *A vendee in default on payments may in a proper case be* enjoined from mining. *Williams* v. *Long*, 738

11. *A defendant cannot rightfully be enjoined from "entering"*

INJUNCTION. *Continued.*

or trespassing upon land of which he is in the conceded possession. He may be enjoined from committing waste but not from working or otherwise exercising the incidents of possession. *Id.*

12. *The forfeiture or reversion to the vendor*—the right to restoration of possession—are questions which can be determined only on final hearing. *Id.*

See CONTEMPT; NATURAL GAS, 4, 11; TAX, 2.

INSPECTION.

1. *On inspection of mine by jury.* there being no special instruction as to examination of any particular working, it is not matter of reversal that certain of the jurors did not examine certain of the shafts. What they wish to examine is left to their discretion. *Beals* v. *Cone*, 592

INSTRUCTIONS.

1. *An erroneous instruction is presumed to be prejudicial*, and is not cured by a correct direction in another part of the charge. *Durant Co.* v. *Percy M. Co.*, 27

2. *A general verdict on an erroneous instruction cannot stand*, where there are two theories on which the jury might have found it, under one of which the instruction was harmless, while under the other it was error, since error is presumed to be prejudicial, and it cannot be said on which theory the verdict was based. *Id.*

See BROKER, 1; MEASURE OF DAMAGES, 3.

INTEREST—See MEASURE OF DAMAGES, 4.

JURISDICTION—See ADVERSE CLAIM, 6, 7.

JURY.

1. *Calling jury in two-division court.*—Consideration of the practice as to selecting jury where the court has two divisions and a double panel of jurors. *Beals* v. *Cone*, 592

2. *The fact of selecting deputies as talesman* "is not the slightest reason to impugn the integrity of the sheriff." *Id.*

3. *Misconduct of guide and separation of jury* considered and held insufficient to constitute error. *Id.*

LACHES.

1. *Partnership accounting—Trust—Delay amounting to laches.*—The plaintiffs and the defendant L. entered into a partnership for

LACHES. *Continued.*

the purpose of locating, developing, and operating mines. While prospecting under the agreement, L. located two mining claims in his own name, contrary to the agreement; and on July 27, 1894, conveyed a part interest to third persons; and on March 6, 1896, the entire interest in the claims was transferred to the defendant corporation, organized for that purpose, in exchange for stock. The complainants were first advised of the sale of part interest in the claims in 1895, but never communicated with L., for the purpose of obtaining an accounting or ascertaining his intentions. On November 13, 1897, about one year after plaintiffs were informed of the conveyance to the corporation, and two years after the first conveyance, and after the claims had increased in value to an amount exceeding $200,000, and expenditures had been made in developing them, they filed a bill against L. and the corporation, asking for a dissolution of the partnership and an accounting, and that the defendant corporation be decreed a trustee for the benefit of plaintiffs. *Held*, that the plaintiffs had been guilty of laches barring the suit. *Curtis* v. *Lakin*, 35

2. *Excuse of paper mislaid.*—The delay of plaintiffs in commencing suit against their co-partners for dissolution and an accounting, and to declare a third person purchasing partnership property from him a trustee, is not excused by the fact that the partnership agreement had been misplaced, and was not found until shortly before the suit was commenced. *Id.*

3. *Interest of innocent stock buyers.*—Partners instituting suit to compel a co-partner to account for the proceeds of partnership property transferred to a corporation in exchange for stock, and to compel the corporation to transfer to them the stock, where it does not appear that the corporation had notice of their claim, and the stock may have been passed into the hands of innocent purchasers, must proceed with reasonable diligence, and, where they have waited a year before commencing suit, relief will be denied. *Id.*

See ESTOPPEL, 1; TRUST, 1.

LAND OFFICE.

1. *The adjudication in the land office* upon a protest that the applicant is not in position to press his application for patent is not *res-adjudicata* of the same facts involved in that issue where the parties appear as suitors in a suit supporting an adverse claim. *Beals* v. *Cone*, 591

2. *Statements made by a party in a land office proceeding are not an estoppel* when it is not averred that they were made with the intention that they should be acted on by the party now asserting the estoppel. *Id.*

LAND OFFICE. *Continued.*

3. *No fact found by the land office is res adjudicata* in a subsequent suit between the same parties where the parties appeared in the two proceedings in different capacities and the ultimate objects of the two were wholly different. *Id.*

4. *An applicant in the land office must show certain facts:*— If he fails and his application is dismissed it is the equivalent of a non-suit only. The finding of non-mineral discovery does not disprove discovery when alleged in court. *Id.*

LEASE.

1. *A tenant under such lease shut down* with the intention of shortly resuming: *Held*, that "the moment" she failed to produce oil in paying quantities she became a tenant at will. *Cassel* v. *Crothers*, 160

2. *Bonus reserved no covenant running with the land.*—A lessee who assigns a lease of oil lands for a cash consideration, and an additional sum to be paid if oil is found on the premises, cannot recover of a second assignee such additional sum, after oil is found by him; for it is merely a bonus to be paid by the first assignee, and not a covenant to run with the land. *Fisher* v. *Guffey*, 174

3. *A reference in a later lease* to an outstanding prior lease construed as notice of the claim of the first lease and the assignment to the second lessee of the right to treat the first lease as forfeited. *Aye* v. *Philadelphia Co.*, 177

4. *The rule, that where the parties have expressly agreed* on what shall be done there is no room for the implication of anything not so stipulated for, is equally as applicable to oil and gas leases as to any other contract. *Id.*

5. *Where the lessees in an oil lease fail to put their lease on record* and never go into actual possession or occupation of the land, their title may be cut out by that of a subsequent purchaser for value without notice. *Aye* v. *Philadelphia Co.*, 182

6. *If one party may terminate an estate at will*, so may the other. The right to terminate is mutual. *Eclipse Co.* v. *South Penn Co.*, 234

7. *Right to surrender.*—An executory gas and oil lease, which provides for its surrender at any time, without payment of rent or fulfillment of any of its covenants on the part of the lessee, creates a mere right of entry at will, which may be terminated by the lessor at any time before it is executed by the lessee. *Id.*

8. *The execution of a new lease* to other lessees and possession thereunder, render such prior executory lease invalid. *Id.*

9. *An executory lease that is unfair*, unjust, or unreasonable will not be enforced in equity. *Id.*

LEASE. *Continued.*

10. *Unilateral oil lease.*—An executory oil and gas lease, which does not bind the lessees to carry out its covenants, but reserves to them the right to defeat the same at any time, and relieve themselves from the payment of any consideration therefor, is invalid to create any estate other than the mere optional right of entry, which is subject to termination at the will of either party. *Trees* v. *Eclipse Co.*, 260

11. *Decease of lessor.*—Such executory lease is terminated by the death of the lessor. *Id.*

12. *Rights of lessee of part of the owners.*—A person holding a valid executory oil and gas lease, executed by several of a number of co-tenants, has such an inchoate interest in the land subject to such lease as will enable him to maintain an injunction to prevent a wrongdoer from committing waste by the extraction of oil and gas. *Id.*

13. *Lessee to pay for coal left unmined.*—Where defendant leased a mine, agreeing to pay a royalty for all coal in the seam which could be reasonably mined, and at the expiration of the lease to pay for all coal in the seam whether mined or not—on terminating the contract, in the absence of a stipulated safe mode for mining the coal, defendant was only liable for such coal remaining in the mine as could be mined by modes usually adopted in that locality with reasonable safety, and was not liable for coal rendered unmerchantable from causes which could not be prevented by prudent management. *Gaines* v. *Virginia Co.*, 393

14. *Faults—Pillars—Waste.*—In such case he is not to pay for such coal as in ordinary mining would have to be left for supports nor for such as would be lost by unavoidable waste; and, if a fault in the coal was found so as to make the mining of the coal impracticable, the lessee was not bound to mine it. *Id.*

15. *Implied covenant.*—In a lease for oil and gas there is an implied covenant of right of entry and quiet enjoyment for the purposes of the lease. *Knotts* v. *McGregor*, 432

16. *Second lease on same premises.*—The covenant of quiet enjoyment in a lease for oil or gas, or other purposes, is not broken by the mere fact, alone, that the lessor makes another lease during the term, of the same premises, whether the first lessee be in actual possession or not; the second lessee not entering. *Id.*

17. *Excluded lessee.*—The covenant for quiet enjoyment implied in a lease for oil is broken by the exclusion by the lessor of the lessee from taking possession for the purposes of the lease, or his withholding from him the possession of the land for the purposes of the lease. *Id.*

18. *Self-ending lease without rental.*—Where an oil lease provided that if no well was completed within 90 days the same should

LEASE. *Continued.*

become void unless the tenant should pay a certain rental, with no covenant either to sink or to pay the rent, no cause of action exists against the tenant for his failure to pay rent. *Brooks* v. *Kunkle*, 540

19. *No right to pay forfeit and renew.*—A provision in an oil and gas lease by the terms of which the lessor is to be compensated solely by a share of the product, that, in case of the failure of the lessee to comply with a condition requiring him to complete a well on the property within a stipulated time, he shall pay a forfeiture of $50, must be construed as providing a penalty intended to secure the performance of such condition, and not as an alternative condition; and where the lessee makes no attempt to fulfill the condition, and has no intention of doing so, he cannot, by a tender of the penalty, retain the lease in force until the expiration of its term, and thus secure an option on the property for speculative purposes. When, by his failure to comply with the condition, further performance of the contract becomes optional on his part, it is also optional on the part of the lessor. *Huggins* v. *Daley*, 377

See ABANDONMENT, 3-5; EXECUTORS AND ADMINISTRATORS, 1; FIXTURES, 1-5; FORFEITURE, 1, 2; MORTGAGE; NATURAL GAS; OIL; PARTIES; RELOCATION, 2; RENTS AND ROYALTIES; RESERVATION, 1.

LIEN.

1. *Lien of a partner.*—Under the rule in *Duryea* v. *Burt* a mining partner "has a specific lien on the partnership property not only for the debts and liabilities due to third persons but also for his own share of the capital stock and funds and for all moneys advanced by him for the use of the concern." *G. V. B. Mining Co.* v. *Bank*, 66

2. *Partners have a lien on the social property* for advances or balance due them, after debts; but if they have divided the property or product of the business, giving each his share in severalty, and separating it from the balance, no such lien exists on the property or product so actually divided. Such is the case with "division orders" in oil mining. *Childers* v. *Neely*, 222

3. *Full accounting with dissolution.*—If a bill is filed by a member of a co-partnership for dissolution and account, and cause is shown for dissolution, there should be a decree of dissolution and full account, not one allowing the partnership to continue its business, and making only a partial account, and decreeing on its basis in favor of one against another member for a balance on such partial account, leaving assets untouched by the account. *Id.*

4. *Receiver.*—When cause is shown for dissolution of a partner-

LIEN. *Continued.*

ship, and the members are discordant and at ill will, and the partnership hopeless of prosperity, it should be dissolved, and a receiver and manager appointed, instead of leaving its assets and business wholly in the possession and control of one member, excluding the other. *Id.*

5. *Executor holding title in his individual name.*—Where an executor purchases a mining property with the funds of the estate, and takes title in his individual name, and, while the title so stands of record, laborers are employed by one, under the authority of the executor, to pump water out of the mine, and to take out ore, for which they are not paid, upon the filing of their claims for liens the laborers become "encumbrancers for value," Civil Code, § 856, providing that no implied or resulting trust can prejudice the rights of a purchaser or incumbrancer of real property for value, without notice of the trust. *Chappius* v. *Blankman*, 461

See MORTGAGE.

LOCATION.

1. *Suit before record.*—Where suit is brought before expiration of the period allowed to file location certificate the plaintiff is only required to prove the discovery and location—the acts required of him prior to his record. *Kinney* v. *Fleming*, 13

2. *Invasion by second party within the 20 days.*—Under Comp. St. div. 5, § 1477, which provides that the discoverer of a mining claim shall have 20 days in which to complete the location and make the necessary record, a discoverer who posted in plain view a notice of location, and "claim of 1,500 feet on this lead, with twenty days for prospecting," if he made it in good faith, and with an intention to complete his location within the prescribed 20 days, thereby acquired a right to all the ground along the lead legitimately covered by his notice; and one locating thereon subsequently to such notice, and prior to the expiration of the 20 days, does not acquire a superior title, though he filed his statement and record within 20 days, and the former did not. *Bramlett* v. *Flick*, 104

3. *Equal distance presumed.*—A notice, posted by the locator of a claim that he claims 1,500 feet on a lode, will be construed to limit his claim to 750 feet along the lode on either side of the point of discovery. *Id.*

4. *The fact that the location includes* ground not legitimately covered by the notice does not invalidate the location outside the overlap. *Id.*

5. *Clandestine location.*—No right can be initiated on govern-

LOCATION. *Continued.*

ment land which is in the actual possession of another by a forcible, fraudulent, or clandestine entry thereon for the purpose of locating it as a mining or other claim. *Nevada S. Co.* v. *Home Co.*, 283

6. *Proof of location in general terms.*—Where, at the time of the location of certain mining claims, notices were posted thereon, and subsequently recorded in the record of the mining district, and the claims were marked by monuments, so that the boundaries could be readily ascertained, the location was valid. *Risch* v. *Wiseman*, 409

7. *A tie to a patented mine* makes a good description. *Duncan* v. *Fulton*, 522

8. *Gulch a natural monument.*—A description in the location certificate of a mining claim that the mine is located in a certain section on top of the mountain south of Dew Drop gulch is sufficient, since such gulch is a natural object or permanent monument. *Id.*

9. *A locator may swing his claim at will* where no conflicting location has intervened. *Id.*

10. *That a corner falls on a railroad embankment* is no excuse for failure to place it unless it would have been so close to the track as to interfere with the passage of trains. *Beals* v. *Cone*, 592

See ABANDONMENT, 1; DISCOVERY; DISTRICT RULES; ESTOPPEL, 2; EVIDENCE, 7; POSSESSION, 3.

LOCATION CERTIFICATE.

1. *Tieing to adjoining claim.*—The call in the notice for an adjoining mine makes a good tie. It is a reference to a permanent monument. And if the existence of the mine so called for is disputed the objecting party must show its non-existence. *Kinney* v. *Fleming*, 13

2. *Sufficient location certificate.*—The location certificate in evidence examined and held a fair compliance with the statute. *Id.*

3. *Sufficient description.*—A notice of location of a mining claim which by reference to natural objects and monuments erected by the locator, contains directions which, taken in connection with such objects, would enable a person of ordinary intelligence to find the claim and trace its boundaries, is sufficient. *Bramlett* v. *Flick*, 103

4. *Whether or not a claim could be ascertained from such notice* and the proof in regard to the surroundings is for the jury. *Id.*

5. *Distance from other claims.*—In an action to determine adverse claims to a mining claim, a notice of location which described a claim as being situated in a certain county, a certain distance

LOCATION CERTIFICATE. *Continued.*

from another claim, and defined by courses marked by substantial monuments, readily identified by marks thereon, taken in connection with evidence that the locator discovered gold-bearing quartz, and made a monument at the place of discovery, upon which he posted his notice of claim, shows prima facie ownership of such claim. *Id.*

6. *Antedating notices.*—Where a locator of a mining claim on government land fraudently antedates his notice of location for the purpose of defeating an actual locator thereon, such location is fraudulent as against such rightful claimant, and is also fraudulent as against the government. *Muldoon* v. *Brown*, 269

7. *The date of the location required to be given* in the notice means the correct date, and not a fictitious or fraudulent date. *Id.*

See EVIDENCE, 2; LOCATION.

LODE.

1. *The word vein has no arbitrary meaning applicable to every case.*—The conditions of locality and deposit must be considered. With these considerations the definition in the court's instructions is upheld. *Beals* v. *Cone*. 592

See SIDE VEINS; TUNNEL, 1, 3.

MASTER AND SERVANT—See NEGLIGENCE.

MAXIMS.

1. *Stare decisis.*—A wrong decision of the court should not be followed unless it has been its rule of action so long, and relied upon to such an extent, that greater injustice and injury will result from a reversal, though wrong, than to observe and follow it. *Calhoun M. Co.* v. *Ajax M. Co.*, 192

2. *Stare decisis in court not of last resort.*—Where the decision of a tribunal is subject to review by one having superior authority over it, for that purpose, or the same question may be passed upon by the superior tribunal in another case, the doctrine of *stare decisis* does not apply with full force till the question has been determined by the court of last resort. *Id.*

See ORE, 1; TAILINGS, 2.

MEASURE OF DAMAGES.

1. *Intent controls—Value of ore in place.*—While one who willfully and intentionally takes ore from another's mine is not entitled to deduction from the value thereof for labor bestowed, where the taking was inadvertent, and under an honest mistake as to the

MEASURE OF DAMAGES. *Continued.*

ownership of the land, only the value of the property in its original place can be recovered. *Durant Co.* v. *Percy M. Co.*, 27

2. *Where a trespasser fails to use ordinary care to ascertain the boundary* line between his land and that on which he entered, the jury may infer that the trespass was intentional. *Id.*

3. *Instruction on intent.*—Where the evidence as to the defendant's intent in taking ore from another's land adjoining his mine was conflicting, an instruction that, if defendant had been negligent in failing to discover the location of his property, he was estopped to say that the taking was not willful or intentional, was erroneous. *Id.*

4. *Interest as damages.*—In an action for conversion of personalty, the court may allow as damages for the detention a sum equivalent to the legal interest on its value from date of the conversion. *Updegraff* v. *Lesem*, 620

MECHANICS' LIEN.

1. *Stoping.*—Labor performed in breaking down and tearing away from the face of the drifts and mine the quartz and other substances in a mine is within the provisions of Code Civ. Proc. § 1183, giving a lien for labor "in the construction, alteration or repair of a mine." *Chappius* v. *Blankman*, 461

2. *No lien for fuel and supplies.*—Illuminating oil, mica grease, lubricating oil, and gasoline for fuel, used in a mining plant did not enhance the value nor become part of the machinery, and hence were not lienable, within Code Civ. Proc. § 2130, providing that every person furnishing material for any machinery, fixture, or building shall have a lien therefor. *Holter Co.* v. *Ontario Co.*, 518

MILL SITE—See TAILINGS.

MINERAL LANDS.

1. *There must be proof that the land is valuable as mineral land* where it has been located on the grounds of an Indian reservation recently thrown open to mineral entries only. There being no such proof there must be judgment in an adverse claim suit that neither party is entitled to the land. *Durant* v. *Corbin*, 84

2. *Mining ground defined.*—The act requiring ratification by stockholders of a mortgage by a company on its mining ground is not confined to land valuable for minerals under the mining act of congress, but covers any instance where land is held by a corporation and subjected to extraordinary processes of mining for commercial purposes, regardless of the chemical or geological character

MINERAL LANDS. *Continued.*

of the article mined or the economical success of the work. *Johnson* v. *Cal. Lustral Co.*, 314

3. *Paint stone.*—A mortgage on ground worked for lustral or paint stone, worked and got by the ordinary modes of mining, pulverized, and the product sold to be made into paint, is a mortgage on mining ground and within the statute. *Id.*

4. *Expert testimony that the land has no value as mining ground* was based on a false standard; a test which would make the question dependent upon too many uncertain and varying contingencies. *Id.*

5. *The act is limited to mining ground* and its appurtenances and does not apply to other realty of the corporation. *Id.*

6. *Private lands included in forestry reservation—Selection by owner of other lands.*—Under the provisions of act, June 4, 1897 (30 Stat. 11, 35, 36), relating to forestry reservations, which give the owner of, or bona fide settler on, a tract of land which may be included within the limits of a public forestry reservation, the right to relinquish the same and select in lieu thereof a tract of vacant land open to settlement, not exceeding that relinquished in area, where a patentee of such a tract relinquishes the same, and selects in lieu thereof a tract which appears by the books of the land office to be vacant and open to settlement, and files his selection in the land office, he becomes at once the equitable owner of the land so selected; and his right to a patent therefor is not affected by the fact that it is situated in the vicinity of producing oil wells, and that it has surface indications of oil, or that it was selected with a view of its possible value as oil land, where no discovery of oil has ever been made thereon. *Olive Co.* v. *Olmstead*, 700

7. *Land to be reserved as mineral* must not only be known to contain mineral but that mineral must have been known to be valuable. *Id.*

MINERALS—See RESERVATION, 1.

MISJOINDER—See EXECUTORS AND ADMINSTRATORS, 2; PRACTICE, 3.

MONUMENTS—See LOCATION; LOCATION CERTIFICATE.

MORTGAGE.

1. *Lien of mortgage takes proceeds as against lessee.*—One who leases mining property from a corporation with full knowledge of a prior mortgage thereon, which is contested by the corporation,

MORTGAGE. *Continued.*

takes subject to all rights of the mortgagee; and, where the validity of the mortgage is sustained, he is not entitled to claim the proceeds of the mines while operated by a receiver appointed in a foreclosure suit, as against the mortgagee on the ground that he expended money to render them productive. *G. V. B. Mining Co.* v. *First Nat. Bank.* 66

See MINERAL LANDS, 3.

NATURAL GAS.

1. *No obligation to work without profit.*—Under a lease providing that if gas be found in sufficient quantities to justify marketing the same the lessee is bound to market the gas if so found, or show some good reason to the contrary. He is not, however, bound to market the gas at a loss, but only at a reasonable profit and in determining whether it could be marketed the expense and all other surrounding incidents would have to be considered. *Iams* v. *Carnegie N. G. Co.,* 335

2. *Tenant bound to operate.*—When the relation of landlord and tenant exists and the product sought for has been found the tenant is under "obligations to operate for the common good of both parties and to pay the rent or royalty reserved." *Id.*

3. *The Indiana statute forbidding waste of natural gas,* compelling steps to prevent its escape, within two days after struck in the well, is not in violation of the Federal Constitution. *Ohio Oil Co.* v. *Indiana,* 466

4. *The enforcement of such act by injunction* is not a taking of property without compensation nor is it a denial of due process of law, but is only a state regulation of a subject which comes within the lawful powers of the state. *Id.*

5. *The supposed deposition of oil and gas in natural underground reservoirs considered,* with regard to the fact of diverse ownerships and the pressure or escape of the gas having an effect to drain adjoining lands owned by others with the holding that it is a matter for state regulation unaffected by any provision of the U. S. Constitution. *Id.*

6. *No ownership in oil or gas until severed.*—The doctrine that a land owner, although entitled to bore wells for natural gas and oil, has no title to those substances as owner until they are actually reduced by him to possession, is settled as a rule of property in the state of Indiana. *Id.*

7. *Geology of the natural gas field of Indiana stated,* with narration of the physical incidents of gas and its peculiar conditions necessitating application of special principles. *Manufacturers Co.* v. *Indiana Co.,* 672

NATURAL GAS. *Continued.*

8. *Natural gas does not become the absolute property* of the owner of the land producing it until reduced to possession. *Id.*

9. *The state has the right by statute to regulate its production*, and to prevent the exhaustion of the common reservoir and to prohibit any owner taking more than his proper share. *Id.*

10. *The statute forbidding the use of artificial pressure* to induce a larger production from the common reservoir is not unconstitutional. *Id.*

11. *Injunctive relief.*—An owner of a gas well has the right to an injunction against the owner of another gas well to prohibit the use of forced pressure. *Id.*

See OIL.

NEGLIGENCE.

1. *Cause of explosion unknown.*—To permit an unnecessary quantity of dynamite to accumulate in dangerous proximity to employees of a mining company, in a situation where opportunity for damage might occur either from the nature of the substance or through carelessness or otherwise, is such negligence on part of a mining company as will render it liable in damages for the death of an employee from an explosion of the dynamite, though the direct cause of such explosion may be unknown. *Asbestos Co. v. Durand*, 452

2. *Law of fellow servant in Quebec.*—As the doctrine of common employment does not prevail in the Province of Quebec, acts or omissions by fellow servants of the deceased do not exonerate employers from liability for the negligence of a servant which may have led to injury. *Id.*

3. *Cause of accident a jury question.*—The place of an explosion in a mine, and its cause, and what, if any, negligence the owner is guilty of, are questions for the jury, when the evidence offered requires their submission. *Deserant v. Cerillos Co.*, 573

4. *Congressional regulation of coal mining in the Territories.*—The act makes three requirements: 1. Ventilation of 3,300 cubic feet per minute for every fifty men; 2. Proper appliances to force the air to the breast; 3. Keeping all workings clear of standing gas; and if either of these three be neglected and injury occurs, defendant is liable. *Id.*

5. *The act peremptory.*—The act does not give to mine owners the privilege of reasoning on the sufficiency of appliances for ventilation, or leave to their judgment the amount of ventilation that is sufficient for the protection of miners. *Id.*

6. *It does not allow standing gas*, but requires the mine to be kept clear of it, and if this is not done the consequences of neglec-

NEGLIGENCE. *Continued.*

ting it cannot be excused because some workman may disregard instructions. *Id.*

7. *It is the master's duty to furnish safe appliances* and safe working places. *Id.*

8. *Where the negligence of a fellow servant contributing with* the neglect of duty of the master produces the injury, the master is liable. *Id.*

9. *Instructions construing the congressional mine regulations and the law of "safe place,"* reviewed and held erroneous. *Id.*

See PARTNERSHIP, 5.

NEW TRIAL.

1. *Newly discovered evidence* should not induce a new trial unless it would clearly have produced a different verdict. *Beals* v. *Cone*, 592

NONSUIT.

1. *Nonsuit confined to causes stated in motion.*—A party moving for a nonsuit should specifically state the grounds upon which he bases his motion, and thereby call the court's attention and that of the opposite party to the point on which he relies, for an appellate court will not sustain a motion for a nonsuit, except on the grounds alleged in the motion. *McIntyre* v. *Ajax M. Co.*, 142

See LAND OFFICE, 4.

NUISANCE.

1. *No lawful business can be per se a nuisance.*—Whether an oil and gas well be a nuisance to a neighboring dwelling depends on its location, capacity and management. *McGregor* v. *Camden*, 274

2. *Facts which make it a nuisance.*—When such a well has such capacity, management, and location with regard to a dwelling house and its appurtenances as to materially diminish the value thereof as a dwelling, and seriously interfere with its ordinary comfort and enjoyment, it is an abatable nuisance. *Id.*

3. *If there is any way that such well can be operated* so as not to make it a nuisance, only the unlawful operation thereof will be enjoined. *Id.*

OIL.

1. *Lease as long as oil is found in paying quantities.*—A lease of land on royalty for a fixed term and "as long thereafter as oil

OIL. *Continued.*

is found in paying quantities" becomes on expiration of the fixed term a lease at will determinable by either party, as soon as oil ceases to be produced in paying quantities. *Cassell* v. *Crothers*, 160

2. *First test well dry.*—Where an oil lease provides for the completion of a test well within a certain time, but makes no provision for the contingency of the test well proving dry, there is an implied obligation on the lessee, after having completed a test well which has proved dry, to proceed further with the exploration and development of the land with reasonable diligence according to the usual course of the business. *Aye* v. *Philadelphia Co.*, 177

3. *A failure to so proceed* with the exploration is an abandonment, which will sustain a re-entry by the lessor. *Id.*

4. *The drilling of a well in the vicinity*, but on another farm, while *pro tanto* a fulfillment of their covenant with their lessor, is not sufficient to put any one else on inquiry. *Aye* v. *Philadelphia Co.*, 182

5. *Courts of equity will not enforce an implied covenant* in an oil and gas lease the extent of such implied covenants depending wholly on oral evidence of opinion. *Colgan* v. *Forest Oil Co.*, 338

6. *There is no relation of special trust or confidence between lessor and lessee* in gas or oil leases, any more than in any other. Like all other contracting parties they deal at arm's length, each for his own interest. So long as the question is one of business judgment and management, the lessee is not bound to work unprofitably to himself for the profit of the lessor, and the parties must be left as in other cases to their own ways. It is only when a manifestly fraudulent use of opportunities and control is shown that courts are authorized to interfere. *Id.*

7. *One lessee of two lessors on adjoining tracts.*—If a lessee of oil and gas lands derive some collateral or incidental advantages from his lease of the adjoining territory he is entitled to them, just as a stranger would be. He may operate the two leases jointly, at less expense, or he may be helped in other ways by having both under one management. It is only when wells on adjoining territory are being fraudulently used to drain the lessor's land that courts have any occasion to interfere. *Id.*

8. *When not bound to sink "offset" well.*—A lessee of adjoining oil lands of different persons, though putting down a well on one tract near the dividing line, is not bound to put one down as an offset on the other side, if, being lessee of this tract only, it would not be profitable for him to do so. *Id.*

9. *Idem.*—A lessee of oil lands, who has expressly covenanted only to put down one oil well on the premises, and who has put down several on one side of the lands, cannot be compelled, under

OIL. *Continued.*

any implied covenant, to put down a well on the other half, or to surrender such half, unless it is clearly shown that he is not acting in good faith on his business judgment, but fraudulently, with an intention to obtain a dishonest advantage. *Id.*

10. *Lessee's right to use his own judgment.*—A lessee of oil lands cannot, under any implied covenant, be compelled to put down a well on a certain part of the premises, on penalty of forfeiture of the lease, except on proof of fraud in fact. It is not enough that, as against his judgment that it would not be profitable, the lessor, or experts, or the court, or all of them, have a different opinion. *Young* v. *Forest Oil Co.*, 345

11. *Testing, when not compelled.*—A bill in equity will not lie by the lessor of an oil and gas lease against the lessee or his assigns, to compel the latter to test part of the leased land not yet drilled, or upon his failure to do so, to surrender the land to the lessor, unless it is shown that the failure of the lessee to drill amounts to a fraud upon the rights of the lessor. *Id.*

12. *Oil in "paying quantities."*—Where a lease is to continue as long as oil or gas is found or produced in paying quantities, the phrase, "found or produced in paying quantities," means paying quantities to the lessee or operator. If oil has not been found, and the prospects are not such that the lessee is willing to incur the expense of a well (or second or subsequent well, as the case may be), the stipulated condition for the termination of the lease has occurred. So, also, if oil has been found, but no longer pays the expenses of production. But if a well, being down, pays a profit, even a small one, over the operating expenses, it is producing in "paying quantities," though it may never repay its cost, and the operation as a whole may result in a loss. *Id.*

13. *Right to use force pump drawing oil from adjoining land.*—Defendant, having a right to drill for oil and gas on a farm adjoining plantiff's, cannot be prevented from using a pump which, by its power, draws the oil from plaintiff's land, since defendant has the incidental right to use the most effective machinery, and plaintiff's property in the oil and gas in his land is not absolute until reduced to actual possession by being brought to the surface. *Jones* v. *Forest Oil Co.*, 350

14. *No property in oil till found—Implied covenant for diligent search.*—By a course of decision in West Virginia which has established a rule of property, it is settled that an oil and gas lease in which the sole compensation to the lessor is a share of the product is not a grant of property in the oil or in the land until oil is actually produced, but merely of the right of possession for the purpose of exploration and development; and there is always an

OIL. *Continued.*

implied, if not an expressed, covenant for diligent search and operation. *Huggins* v. *Daley*, 377

15. *Construed in favor of lessor.*—A different rule of construction obtains as to oil and gas leases from that applied to ordinary leases or to other mining leases, and owing to the peculiar nature of the mineral, and the danger of loss to the owner from drainage by surrounding wells, such leases are construed most strongly in favor of the lessor. *Id.*

See DISCOVERY, 1, 7; LEASE; NATURAL GAS.

ORE.

1. *De minimis.*—A general allegation that returns fell short of the 70 per cent. not stating the shortage will be construed as the smallest fraction of one per cent. and the maxim *de minimis non curat lex*, applied. *Fox* v. *Mackay*, 89

See MEASURE OF DAMAGES, 1.

PARTIES.

1. *Lessor not joining in trespass.*—Where there is more than one lessor and more than one lessee, but a single lessee is sole owner of the fixtures and a single lessor converts them, the party not owning the property and the party not joining in the trespass are not necessary parties. *Updegraff* v. *Lesem*, 620

See ADVERSE CLAIM, 5.

PARTNERSHIP.

1. *Mine operated by receiver.*—The law of mining partnerships, as declared by the courts or by the statutes of Idaho, does not entitle a mining partner to a lien on the product of a mine for his share of past profits made by his partners while he was excluded from the property, as against a mortgagee of the interests of such partners, although he will be entitled to his share of the product while the mine is operated by a receiver appointed in a suit to foreclose the mortgage. *G. V. B. Mining Co.* v. *Bank*, 66

2. *Working co-tenants are partners.*—Where tenants in common or joint tenants of an oil lease or mine unite and co-operate in working it, they constitute a mining partnership. *Childers* v. *Neely*, 222

3. *Majority controls.*—When members of a mining partnership cannot agree in management, those having a majority interest control its management in all things necessary and proper for its operation. *Id.*

4. *Sale no dissolution.*—A sale of his interest by a member of a mining partnership to another member or a stranger does not dissolve the partnership, as in ordinary partnerships. *Id.*

PRACTICE. *Continued.*

action or two assignments of breaches of contract are in the same count, by electing to proceed only on certain causes of action or assignments. *Knotts* v. *McGregor*, 432

See NEW TRIAL; NON-SUIT; PLEADING; PROSPECTING CONTRACT. 1.

PRACTICE APPELLATE.

1. *The court will not look beyond the printed abstract* into the record to support error assigned by the party who prepared the abstract. *Leech* v. *Clemons*, 186

2. *A judgment supported by the findings* will not be reversed on appeal because of a finding, on an immaterial matter, contrary to the evidence. *Costa* v. *Silva*, 330

3. *Opinion evidence when immaterial.*—Where plaintiff testified to facts showing himself entitled to one-fourth interest in a mining claim, of which defendant held the legal title, the fact that a portion of such testimony objected to and received was matter of opinion was not reversible error. *Id.*

4. *Sweeping exception.*—The court will not review exceptions to instructions which gave the trial court no opportunity to correct. An exception to each and every instruction will not avail against any instruction which is in part correct. *Beals* v. *Cone*, 592

PROSPECTING CONTRACT.

1. *An action upon a prospecting contract* is necessarily one of equitable jurisdiction. *Prince* v. *Lamb*, 419

2. *Such an agreement does not constitute a partnership* between the parties. *Id.*

3. *Inadequate consideration.*—Where the complaint alleged that plaintiff furnished defendant $50 as a grub stake with which to go from Los Angeles, California, to Alaska or the Northwest Territory, Canada, there to prospect for mines and to divide his finds with his outfitter the court will take judicial notice that such an amount is not enough to pay the expense of such a journey and refuse specific performance upon the ground of inadequacy of consideration. *Id.*

4. *Facts of the case—Theory of trust.*—Where the evidence showed that plaintiffs contributed part of the provisions for a prospecting trip, but left it doubtful whether they were to be interested in new discoveries or only in the location work on some undisputed claims: *Held*, that a prospecting contract must be as strictly proved as any other resulting trust and that their case was not made good. *Rice* v. *Rigley*, 553

5. *Degree of proof.*—To establish a resulting trust in land, the

PROSPECTING CONTRACT. *Continued.*

evidence must be so clear and certain as to leave no well-founded doubt upon the subject. *Rice* v. *Rigley*, 553

RECEIVER.

1. *Mine worked to a loss—Plaintiffs liable.*—Where parties apply for a receiver to work a mine held under lease and the working results in a loss plaintiffs are liable for the deficit. *Welch* v. *Renshaw*, 399

2. *Where a receiver has no funds*, the sole assets being a lease worked to a loss, judgment should go as for costs against the plaintiffs and if their associates are liable for contribution there may be judgment against them in the same case or in another action. *Id.*

3. *Items in a receiver's report not excepted* to before approval cannot be attacked on the final report. *Id.*

4. *Compensation—Counsel.*—The court may fix a per diem to the receiver without requiring a detailed bill of his services. They may allow him counsel and fees for counsel and the compensation of both receiver and his attorney will be largely left to the discretion of the court. *Id.*

See ANNUAL LABOR, 3; LIEN, 4; PARTNERSHIP, 1.

RECEIVERS RECEIPT—See ANNUAL LABOR, 4, 5.

RECORD—See LEASE, 5; LOCATION, 1, 2.

RELATION—See DISCOVERY, 4.

RELOCATION.

1. *New discovery after hostile patent over the old shaft.*—The Wheeler lode was the older claim, but it allowed the Evening Star to go to patent without adverse. The Evening Star survey took in the Wheeler discovery, but its owners sunk a new discovery on their clear ground. *Held* that the Wheeler location remained valid as to all the ground outside the Evening Star lines. *Silver City Co.* v. *Lowry*, 55

2. *Lessees attempting to relocate.*—Lessees of mining ground in possession who oust their lessor by relocating the ground, and setting up an adverse title in themselves, forfeit all rights under the lease. *Id.*

3. *A miner's second record* should be styled an additional, rather than as his amended, location certificate. *Duncan* v. *Fulton*, 522

RELOCATION. *Continued.*

4. ***Both certificates to be construed together.***—Where the original location certificate which is defective is followed by an additional certificate both should be admitted and if they together furnish a sufficient description and otherwise comply with the law the location is valid. *Id.*

5. *Description as found from the two.*—Where an original certificate sufficiently located a discovery shaft, and an additional certificate gave a description by metes and bounds starting with the discovery shaft, and running to posts in mounds of stone, the claim could be identified with certainty from both certificates taken together, and hence such certificates were admissible to establish the locator's claim, though neither, taken alone, sufficiently described such claim. *Id.*

6. *A relocation upon a discovery shaft*, the old discovery showing no vein, is practically an original location. *Beals* v. *Cone.* 592

See DISCOVERY, 3.

RENTS AND ROYALTIES.

1. *Construction of no rental due.*—An oil and gas lease provided that this lease shall become null and void, and all rights thereunder shall cease and determine, unless a well shall be completed on the premises within one year from the date hereof, or unless the lessee shall pay at the rate of $350 quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well, until a well is completed. *Held*, that this provision did not bind the lessee to pay any rent for the land, or for delay in commencing to operate, and that an action of assumpsit could not be maintained on such lease for failing to pay such rent, or for such delay. *Snodgrass* v. *S. Penn Oil Co.*, 428

See LEASE, 13, 18.

RES ADJUDICATA—See LAND OFFICE, 1, 3.

RESERVATION.

1. *Facts of the case.*—Defendant's lessees of land with a reservation of "all mines and minerals within or under said land" were sinking a bore hole 18 inches diameter the intended depth of 400 feet. They would necessarily penetrate a seam of building stone and a seam of coal but neither of them commercially workable. *Held:*

That commercial value was not the test and that such mineral seams being the property of plaintiff, the defendants should be enjoined from penetrating them. *Johnstone* v. *Crompton*, 649

RIGHT OF WAY—See WAY.

SCHOOL LANDS.

1. *When too late to attack.*—Where the land has been surveyed, sectionized and designated by the land department as agricultural school land and later patented by the state, the title is beyond attack as being mineral land. *Saunders* v. *La Purisima Co.*, 93

2. *The grant of sections 16 and 36* to the state under the act of 1853 was a grant *in presenti*, and if at that time there were no known minerals, or other exceptions noted in the grant, those sections then became the land of the state. *Id.*

SIDE LINES—See APEX, 4, 7.

SIDE VEINS.

1. *Side veins prior to 1872.*—Before the act of 1872 the locator was confined to one vein, but by that act he becomes entitled to all veins apexing within his exterior lines. *Calhoun M. Co.* v. *Ajax M. Co.*, 192

2. *Blind and undiscovered veins.*—The statute giving to locators the right to all veins apexing within the surface lines applies to undiscovered as well as to discovered veins and whether the apex is within the boundaries at the surface or beneath the surface. *Id.*

SPECIFIC PERFORMANCE—See CONVEYANCE.

STARE DECISIS—See MAXIMS.

STATUTE.

1. *The construction of an act of congress* cannot be said to be authoritatively settled until passed upon by the supreme court of the United States. *Calhoun M. Co.* v. *Ajax M. Co.*, 192

2. *An intermediate state court should follow the federal*, not the state, construction of the congressional mining acts where their decisions are not in accord. *Duncan* v. *Fulton*, 522

See CORPORATIONS, 2.

STATUTE OF LIMITATIONS.

1. *The right of action does not accrue until the damage results. Hall* v. *Duke of Norfolk*, 636.

SURFACE SUPPORT.

1. *No liability for results of predecessor's mining.*—The owner

SURFACE SUPPORT. *Continued.*

of minerals is not liable for damage caused to neighboring land by subsidence occasioned by the working of the minerals by his predecessor in title, although the damage did not actually occur until after the owner came into possession. *Hall* v. *Duke of Norfolk*, 636

TAILINGS.

1. *Respective duties of upper and lower mills.*—The upper mill must recognize the rights of mills below and impound its tailings or otherwise prevent their injurious flow to mills below, and the lower mill must stand the consequence of such slight injury as the upper cannot prevent. *Otaheite Co.* v. *Dean*, 688

3. *The maxim sic utere tuo* applies to this class of contentions. *Id.*

3. *Facts of the case—Injunction denied.*—In making preparation to start up a mill for the reduction of gold and silver ores, which had been idle for a number of years, plaintiff found the water at the settling tank, from which the supply of water for operating the mill was obtained, contained a quantity of tailings, and that after being cleaned out the tailings and debris from above came into the tank in such quantities as might, if continued, prevent the mill from being run. Thereupon plaintiff demanded of defendant, who was operating a mill above the plaintiff's on the same creek, that he prevent his tailings from polluting the water, and was given assurance that by the time he got ready to start up this would be done. At the time this suit was commenced defendant was not discharging tailings or sediment into the stream sufficiently to interfere with plaintiff's using its waters for his mill, and had constructed a series of reservoirs by which he impounded the tailings, and prevented any injurious matter flowing from his mill into the creek. *Held*, that plaintiff was not entitled to an injunction restraining defendant from polluting the stream. *Id.*

TAX.

1. *No local taxation.*—A natural gas company organized under the act of May 29, 1885, is a corporation engaged in a business of public interest and cannot be taxed upon the land by the local authorities where it appears that the gas in the land is necessary and indispensable to the company in carrying out the public purpose for which it was incorporated, and is part of its capital stock on which it pays a tax to the state. *St. Mary's Co.* v. *County of Elk*, 76

2. *Injunction is the proper remedy* against a tax on property not subject thereto. *Id.*

TENANTS IN COMMON.

1. *Co-tenant in tunnel using it as access to claims owned in severalty.*—Plaintiff was co-owner with defendant in a group of claims and in a tunnel run to work the same. Defendants were using this tunnel to work a group of claims in which plaintiff had no interest, to the exclusion of plaintiff and preventing the working of the group belonging to the tunnel owners:

2. *Held* (1) That the District Court had jurisdiction as a Court of Equity to give adequate relief. (2) That the complaint stated a good cause for an injunction and, (3) that a co-tenant could not use the common property for the benefit of another property in which associate had no interest. *Peo* v. *District Court*, 734.

See BOUNDARIES; FORFEITURE, 1; LEASE, 12; PARTNERSHIP, 2.

TIME.

1. *Time of essence of contract—Forfeiture.*—Where an oil and gas lease by which the lessor is to be compensated solely by a share of the product contains a proviso requiring the lessee to commence and complete a well on the property within a specified time, such proviso and the time of its performance are of the essence of the contract, and it constitutes a condition precedent to the vesting of any estate in the lessee, without regard to the grammatical construction of the instrument. Where the lessee makes no attempt to comply with such provision, and evidences no intention to do so, at the expiration of the time stipulated the lease becomes forfeitable, at the option of the lessor, although by its terms it is for a definite term of years; and, being in possession, the exercise of such option is sufficiently evidenced by the lessor's execution of a new lease to another party. *Huggins* v. *Daley*, 377

See CONTRACT, 2; FIXTURES, 6.

TRESPASS.

1. *Ore taken by third person.*—In an action for taking ore from another's mine, evidence that an unknown third person, after the commencement of the suit, took out ore, was not competent to prove defendant's trespass to have been willful.—*Durant Co.* v. *Percy M. Co.*, 27

2. *Ore stored under order of Court.*—Where, in an action for the conversion of ore, an injunction has been issued, in compliance with which the defendant has stored certain ore theretofore mined it is not entitled to have the value of such ore taken into account in reduction of damages unless it proves such value, and returns or tenders the ore to the plaintiff. *Montana M. Co.* v. *St. Louis M. Co.*, 508

TRESPASS. *Continued.*

See ABANDONMENT, 2; INJUNCTION, 6, 9, 11; MEASURE OF DAMAGES; PARTIES.

TRUST.

1. *Where a trustee of an express trust openly repudiates it.* and asserts a title in himself to the trust estate, with the knowledge of the beneficiary, the same diligence should be exercised by the person injured in asserting his right as is required by one asserting a constructive trust, or attempting to rescind a contract on the ground of fraud or mistake. *Curtis* v. *Lakin*, 35.

2. *Working together and accepting plaintiff's share of patent expenses proves trust.*—Plaintiff purchased an undivided one-fourth interest in a mining claim, but took no deed, and the parties went into possession, and worked the claim jointly for a number of years. Defendant recognized plaintiff's interest, and requested and received payment for one-fourth of the expense of securing a patent, but refused plaintiff a deed of his interest. *Held*, that defendant held one-fourth of the land in trust, and that plaintiff was entitled to a deed therefor. *Costa* v. *Silva*, 330

3. *Evidence that the defendant requested and received money from plaintiff to pay a portion of the expense* in securing a patent to a mining claim is admissible to show that defendant held a portion of the claim in trust for plaintiff. *Id.*

4. *Preponderance not enough.* In an ordinary equity suit, the allegations of the complaint may be established by a preponderance of the evedince, but to establish a trust in land, and to obtain a decree for specific performance, the contract sought to be enforced must be fully and clearly proved. A mere preponderance of evidence is not sufficient. *Rice* v. *Rigley*, 553

See LACHES, 1; PROSPECTING CONTRACT, 4.

TUNNEL.

1. *The right of a tunnel to the blind lodes* cut on its line does not apply to such lodes where they have been previously enclosed within the exterior lines of a valid surface location. *Calhoun M. Co.* v. *Ajax M. Co.*, 192

2. *A tunnel site has no right of way* to cross a mining location. *Id.*

3. *A tunnel site locator is a trespasser* in attempting to acquire title to the blind veins underneath a prior lode location, and its motion for leave to develop the blind veins in its tunnel within the line of appellee's claim was therefore properly denied. *Id.*

See TENANTS IN COMMON, 1.

VEINS—See APEX; DISCOVERY SHAFT, 2; LODE.

VERDICT—See INSTRUCTIONS, 2.

WASTE—See LEASE, 14.

WAY.

1. *Pipe line across railroad—Way of necessity.*—Where a party has conveyed to a railroad its right of way he retains by implication a right of way of necessity under the railroad bed to conduct natural gas to his residence on the premises out of which the original right of way was granted. *Uhl* v. *Ohio River R. Co.*, 263

See CROSS LODE; TUNNEL, 2.

WITNESS.

1. *Plaintiff testifying after decease of defendant.*—Under the provisions of subdivision 3, § 5957, Rev. St., in an action against an administrator to establish a resulting trust in land, the plaintiff in such action is disqualified from being a witness as to matters of fact occurring before the death of such deceased person. *Nasholds* v. *McDonell* (Idaho), 55 Pac. 894, overruled on that point. *Rice* v. *Rigley*, 553

2. *The term "claim or demand,"* as used in said section 5957, embraces all rights of action for the establishment of a trust in land, as well as claims or demands for debts or damages against the estate of a deceased person. *Id.*

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